UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VATTEROTT COLLEGE – NORTH PARK	)	
Employer,	)	
and	)	Case No. 14-RC-12813
CARPENTERS' DISTRICT COUNCIL OF GREATER ST. LOUIS & VICINITY	)	
Petitioner.	)	

VATTEROTT COLLEGE—NORTH PARK'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S JANUARY 31, 2011, DECISION AND DIRECION OF ELECTIONS

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COMES NOW, Vatterott College—NorthPark, by its attorneys, pursuant to the National Labor Relations Board ("NLRB") Rules and Regulations and Statements of Procedure, as amended, Section 102.67, and submits its Request for Review of the Regional Director's January 31, 2011, Decision and Direction of Elections.

I. PROCEDURAL BACKGROUND

On or about December 27, 2010, Carpenters' District Council of Greater St. Louis and Vicinity (the "Union" or "Petitioner") filed a representation petition in Case 14-RC-12813 seeking to represent certain employees at the NorthPark campus of Vatterott College ("Vatterott" or the "Employer"). The unit sought by Petitioner was defined as follows:

Included: All instructors within Computer Technologies, Cosmetology, Medical Assisting, Plumbing, HVAC, Welding, & Electrical.

Excluded: Managers, Supervisors, and Confidential Employees.

(Bd. Ex. 1(a)).[1] The parties stipulated that the following employees of the Employer constitute separate units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> The Full-Time Instructors Unit
>
> All full-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING adjunct and part-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.
>
> The Adjunct and Part-Time Instructors Unit
>
> All adjunct and part-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility EXCLUDING full-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.

(Bd. Ex. 2).[2]

On January 11 and 12, 2011, a hearing was conducted at the NLRB in Saint Louis, Missouri, before Hearing Officer Mitzi Brigman ("Hearing Officer Brigman"). All parties were afforded a full opportunity to present witnesses, examine and cross-examine witnesses and to make argument. At the close of the hearing on January 12, 2011, Hearing Officer Brigman directed that the parties submit Post-Hearing Briefs to the Regional Director no later than close

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[1] The designation "Bd. Ex. __" shall refer to NLRB Region 14/Board Exhibits offered and received by Hearing Officer Brigman at the outset of the hearing; the designation "EX-__" shall refer to Exhibits offered by the Employer and received by Hearing Officer Brigman at the hearing; the designation "UX-__" shall refer to Exhibits offered by the Union and received by Hearing Officer Brigman at the hearing; the designation "TR-__" shall refer to transcript page citations; the designation "DDE, p. __" shall refer to the Regional Director's Decision and Direction of Elections. A copy of the Regional Director's Decision and Direction of Elections is attached hereto as Ex. A.

[2] By entering into the Stipulation, the Employer expressly reserved, and did not waive, its position that Petitioner is disqualified from representing the units of employees as delineated above (Bd. Ex. 2, n.1). Interestingly, despite this explicit indication, the Regional Director concluded that Petitioner "is not directly engaged in a business similar to the Employer [but,] rather, as *stipulated by the parties*, is a Section 2(5) labor organization with 24,000 members covering a geographical area of three states and thus is not a business competitor of the Employer" (DDE, p. 18) (emphasis supplied). In so concluding, the Regional Director seems to indicate that because the Union is a Section 2(5) labor organization, it cannot *ipso facto* be a business rival of an employer. The Union's status as a Section 2(5) labor organization, however, has no bearing whatsoever on whether it is a competitor or business rival of Vatterott.

of business on Wednesday, January 19, 2011. Thereafter, the parties sought an extension to close of business on Monday, January 24, 2011, and the Regional Director granted the parties a two-day extension until Friday, January 21, 2011, at 4:30 p.m., C.S.T. On January 31, 2010, the Regional Director issued his Decision and Direction of Elections ("DDE").

II. STATEMENT OF THE CASE

Vatterott contends the Union is a business rival by virtue of its extensive apprenticeship programs and its partnership with Ranken College, and, thus, should be disqualified from representing the petitioned-for units of employees. Importantly, at hearing the Union admitted that it is a business competitor with Vatterott, but contended that it should not be disqualified from representing the petitioned-for units of employees.[3] The Regional Director issued his Decision and Direction of Elections on January 31, 2011, finding that Petitioner is not disqualified from representing Vatterott's employees.

Specifically, the Regional Director found the Union is not a business rival and does not control or dominate an organization that is a business rival of Vatterott. The Regional Director further found that, even assuming the Union and its apprenticeship programs are intermingled, no disqualifying conflict of interest exists. According to the Regional Director, Vatterott did not meet its burden that permitting the Union to represent Vatterott's employees would pose a "clear and present danger sufficient to justify limiting employees' statutory right of free choice." It is Vatterott's position that the Regional Director erred in finding that the Petitioner is not a

[3] At the hearing, the Union's counsel framed the Union's position as follows: "We deny that we are a rival. ***We're a business competitor with Vatterott***, regarded as a resource, and do not think that there's a foundation or basis to disqualify the Union from representing one or more units" (TR 10). Following the submission of post-hearing briefs, the Union "filed a Motion to Correct the Record as to its initial statement of position on the record, contending Petitioner's counsel was either misquoted or misspoke" (DDE, p. 2). The Union, however, did not file its motion until ***after*** the parties exchanged their Post-Hearing Briefs and failed to serve a copy of its motion on the Employer notwithstanding its representation within the certificate of service accompanying its motion. The Employer did not learn of the Union's motion until it received the Regional Director's DDE. As such, the Employer was denied its due process rights to respond to the Union's *ex parte* "correction" of the record.

business rival of Vatterott and is not disqualified from representing the petitioned-for employees. Vatterott requests the Board grant review of the Regional Director's Decision and Direction of Elections, reverse the Regional Director's Decision, and dismiss the Petition.

III. BASIS FOR REQUEST FOR REVIEW

Under the NLRB Rules and Regulations and Statements of Procedure, Section 102.67(b) and (c), Vatterott submits that its Request for Review should be granted for the following reasons:

1) Substantial questions of law or policy are raised by the Regional Director's departure from Board law and policy inasmuch as the Regional Director's Decision and Direction of Elections did not correctly apply the applicable legal standard.

2) Substantial questions of law or policy are raised by the Regional Director's departure from Board law and policy inasmuch as the Regional Director's Decision and Direction of Elections failed to consider irrefutable evidence that the Union is a business rival of the Employer and is thus disqualified from representing the Employer's employees.

3) Assuming *arguendo*, but incorrectly, the Board determines the Regional Director did not depart from existing Board precedent, Vatterott submits that there exist compelling reasons for reconsideration of the Board's policy regarding the conflict of interest doctrine and the requisite burden of demonstrating a "clear and present" danger.[4]

4) Substantial questions of law or policy are raised because of the absence of Board law and policy regarding the application of the business rival doctrine in the factually unique context of union apprenticeship programs and vocational education institutions.

5) Hearing Officer Brigman's erroneous rulings regarding Vatterott's offer of proof and attempts to introduce evidence of a clear and potential danger resulted in prejudicial error.

6) Finally, Vatterott submits that the Regional Director ignored or minimized significant, material facts, and that his actions resulted not only in the

[4] As more fully discussed herein, Vatterott respectfully submits that by reading the Board's business rival and conflict of interest cases together, the standard is more accurately described as "clear and *potential*" rather than "clear and present" danger.

Regional Director misapplying extant Board law but also prejudicially affecting Vatterott's rights.

IV. FACTUAL BACKGROUND

A. The Business of the Employer.

Vatterott operates for-profit colleges in numerous locations with a focus on the education of students in chosen career fields (EX 15). Vatterott is accredited by the Accrediting Commission of Career Schools and Colleges ("ACCSC") and is certified to operate as a school of higher learning by the Coordinating Board for Higher Education for the State of Missouri (TR 362; EX 15, p. 52). The only campus at issue is Vatterott's NorthPark campus, located at 8580 Evans Avenue in Berkeley, Missouri (TR 358). There are approximately 1,400 students currently enrolled at Vatterott's NorthPark campus (TR 339, 380).

The NorthPark campus offers Diploma Programs in Combination Welding; Computer Technology; Cosmetology; Electrical Mechanics; Heating, Air Conditioning, and Refrigeration Mechanics; Information Systems Security; and Plumbing (TR 360; EX 15, p. 52). All of the Diploma Programs are sixty (60) weeks[5] long and require equal amounts of classroom and hands-on education in a lab setting (TR 30, 387). Students can also obtain an Associate of Occupational Studies ("A.O.S.") in the following areas: Combination Welding Technology; Computer Systems and Network Technology; Electrical Mechanics Technology; Heating, Air Conditioning, and Refrigeration Technology; Medical Assistant; Medical Billing and Coding; Plumbing Technology; and Web Design and Multimedia Application Development (TR 360-61;

[5] Vatterott's programs are divided into ten (10) week segments referred to as "phases" or "starts" (TR 372).

EX 15, p. 52).[6] Approximately two hundred twenty-five (225) students are enrolled in Vatterott's Electrical Mechanics Technology program (TR 380).

The Associate Programs entail the first sixty (60) weeks of the corresponding Diploma Program coursework plus an additional thirty (30) weeks of more advanced education (TR 30, 390). Vatterott also offers a Bachelor of Science (B.S.) in Computer Engineering and Network Technology (TR 361; EX 15, p. 52).

Vatterott focuses its recruitment efforts on non-traditional students interested in obtaining skill-based training for quick transition to the job market (TR 364). To attract new students, Vatterott utilizes various marketing techniques, such as advertisements on television, in newspapers and other print media, the radio, and the Internet (TR 38-39, 363-64). Vatterott's representatives also attend job fairs, career fairs, and college-based fairs at area high schools to recruit students (TR 38). In fact, Vatterott employs a high school ambassador on its admissions staff whose job is specifically to recruit high school seniors (TR 38).

Admission to Vatterott requires a high school diploma or general education diploma ("GED"), the completion of an application, the completion of an enrollment agreement and financial aid forms (if applicable), and the payment of a registration fee (TR 364). Students are responsible for paying tuition for their education (TR 366-67). Financial aid is available through a number of means, including Federal Pell Grants, Federal Stafford Student Loans, Federal Parent Loans for Undergraduate Students, private loans, and scholarships (TR 366-67). Vatterott also partners with a variety of governmental agencies, including the Veterans Administration and Vocational Rehabilitation (TR 364). Additionally, Vatterott assists students with job placement while students are enrolled and attending classes (TR 13).

[6] Vatterott College—NorthPark's medical program is in "teach out" status, *i.e.*, students are currently enrolled in these programs, but Vatterott is no longer enrolling students in these programs at its NorthPark campus (TR 360-61).

Vatterott maintains articulation agreements with other colleges and universities, *e.g.*, the University of Phoenix and Southwestern College, setting forth the mutual agreement of the schools to facilitate the transfer of students' academic credits (TR 372).[7] Vatterott has articulation agreements with eleven (11) or twelve (12) other institutions, locally and nationally (TR 372). Vatterott, however, does not have any articulation agreements with DOL-approved union apprenticeship programs, including the Associated Electrical Contractors/Local Union No. 57 Joint Apprenticeship Program and the Carpenters' Joint Apprenticeship Program (TR 372).

Vatterott's primary competitors in the St. Louis metropolitan area are Ranken Technical College ("Ranken") (TR 44-45, 200, 337; Bd. Ex. 2, ¶ 9), followed closely by the various DOL-approved union apprenticeship programs, including the Associated Electrical Contractors/Local Union No. 57 Joint Apprenticeship Program and the Carpenters' Joint Apprenticeship Program (TR 200, 334, 337, 347, 358).[8] In fact, Vatterott has lost prospective students to DOL-approved union apprenticeship programs, generally, and to the Carpenters' Union's apprenticeship programs, specifically (TR 47). Even more importantly, in recruiting students, these union apprenticeship programs target the very same individuals as Vatterott (TR 77-78, 160). Indeed, Vatterott representatives have encountered representatives from union apprenticeship programs, including representatives from the Carpenters' Union's apprenticeship programs, at high school nights and job fairs (TR 46). Both Vatterott and the Union's programs advertise in the same

[7] Vatterott does not have any articulation agreements with any DOL-approved union apprenticeship programs. Students who have received training in a DOL-approved union apprenticeship program can take a skills assessment examination and test out of certain coursework requirements. This is because there is "no direct transfer of credit measurement" for coursework competed or skills gained in the context of a DOL-approved union apprenticeship program (TR 370-71).

[8] The interchange of employees between Vatterott and Ranken is further evidence that Ranken is a competitor of Vatterott. Although Hearing Officer Brigman rejected Vatterott's counsel's offer of proof, several of Ranken's employees were formerly employed by Vatterott. This evidence clearly demonstrates that Ranken is a business rival of Vatterott. *See generally*, TR 198-99. Importantly, at the close of evidence on the first day of hearing and prior to Vatterott's offer of proof, Hearing Officer Brigman indicated to the parties that she was going to address the issue of admissibility of the Employer's ability to offer evidence regarding the aspect of the Union's status as a rival and its relationship as a partner with Ranken.

media outlets, using the same advertising mediums, and targeting the same prospective students. The Regional Director, however, ignored all of these material and significant facts in rendering his Decision. *See generally*, DDE, pp. 2-5.

With respect to its Electrical Mechanics program, Vatterott's course offerings cover the **exact same topics** as those covered in the Associated Electrical Contractors/Local Union No. 57 Joint Apprenticeship Program and more (TR 393-403; *cf.* EX 15, pp. 56, 62, and EX 29-30). As Richard Lofftus, Vatterott's Director of Building Trades, testified, "[a] lot more actually" (TR 395-96, 431-32). Likewise, Vatterott's trade programs teach a substantial amount of the material covered in the Carpenters' Joint Apprenticeship Program (*see generally*, TR 404-20). For example, Vatterott teaches health and safety (TR 406-07), fall protection (TR 406-07), shop safety (TR 406-07), residential framing and finishing (TR 407-08), wall framing (TR 408-09), roof framing (TR 409-10), engineered roof trusses (TR 410), stair building (TR 411), framing with metal (TR 412), rough interiors and finished interiors (TR 412), blueprint reading and specifications (TR 413), mathematics (TR 413), and material handling (TR 414). Again, the Regional Director ignored or otherwise minimized these material and significant facts in rendering his Decision (DDE, pp. 22-23).

B. The Carpenters' District Council of Greater St. Louis and Vicinity and Its Apprenticeship Programs.

1. The Carpenters' District Council.

The Petitioner, the Carpenters' District Council of Greater St. Louis and Vicinity, is chartered under the authority of the Constitution of the United Brotherhood of Carpenters and Joiners of America (EX 1; EX 2). There are roughly 24,000 active members in the Carpenters' District Council (TR 240). Terry Nelson is the Executive Secretary-Treasurer of the Union (TR 57; UX 8). Other relevant members of the District Council's Executive Board include Al Bond,

the Assistant Executive Secretary-Treasurer (TR 57; UX 8), and Dr. John Gaal, the Union's Director of Training and Workforce Development (EX 8). As Director of Training and Workforce Development, Dr. Gaal oversees the direction of training and advises the various Joint Apprenticeship Programs on "direction, on process and procedure" for the Carpenters' District Council (TR 222). Dr. Gaal reports directly to Terry Nelson (TR 222). Prior to becoming the Director of Training and Workforce Development, Dr. Gaal worked for the Carpenters' Joint Training Fund from 1983 to January 2003 (TR 224). Dr. Gaal also sits on Ranken's advisory panel for its four (4) year degree program, *i.e.*, its Bachelor of Applied Management program (TR 243).

The Union's International Constitution expressly states that one of the Union's primary objects is "to encourage an apprenticeship system and a higher standard of skill" (TR 59; EX 1, p. 5). The Union's International Constitution further specifies that the United Brotherhood may establish standards for apprenticeship programs and that it is the responsibility of District Councils to develop and implement apprenticeship programs that comply with the standards approved by the United Brotherhood (EX 1).[9] Both of these facts were readily acknowledged by the Regional Director (DDE, p. 7). According to the Union's By-Laws and Trade Rules, "[t]he Executive Secretary-Treasurer shall serve as a trustee on any and all trust funds including, but not limited to, health and welfare, pension, labor-management and *joint apprenticeship and training funds*" (TR 62; EX 2). More importantly, the Executive Secretary-Treasurer, *i.e.*, Terry Nelson in the instant case, has the *exclusive* power and authority to *appoint and remove* labor

[9] Specifically, Section 43 provides, in pertinent part: "The United Brotherhood may establish Standards for apprenticeship and training programs, including skill upgrading, covering trades and industries within the United Brotherhood's jurisdiction. Where such Standards have been established, it shall be the responsibility of District Councils . . . to develop and implement programs complying with the Standards and approved by the United Brotherhood" (EX 1). Petitioner stipulated that it has attempted to comply with the International Constitution in the development of its apprenticeship programs.

representatives to act as trustees for all negotiated employer/union trust funds, including apprenticeship and training funds (TR 62; EX 2)—a fact ignored by the Regional Director. Moreover, Petitioner stipulated that it has attempted to comply with the Carpenters' District Council's By-Laws and Trade Rules in the administration of its benefit programs, including in the administration of the apprenticeship programs and its trust fund (TR 62).

In fact, although the Regional Director acknowledges that Nelson is required to serve as a trustee pursuant to the Union's By-laws and Trade Rules, he minimizes the control Nelson exercises over the other Union trustees (DDE, p. 8). Specifically, the Regional Director claims they are "elected to their trustee positions by the 300 delegates of the Petitioner and[,] thus[,] are subject to being voted out[,]" notwithstanding the fact that the same By-laws and Trade Rules expressly provide that Nelson has the *exclusive power* to appoint and remove them (TR 62; EX 2). Additionally, the Carpenters' District Council provides skill development training through its apprenticeship programs as a free benefit to its members (EX 10). Such training is free to the members since the Union pays monies from its treasury to the trust fund as and for the tuition (TR 232; EX 3-7). The Union markets these classes to its members through a monthly newsletter called *The Cutting Edge* (TR 237). Some of these courses are offered through Ranken (TR 239). Here again, the Regional Director ignored significant evidence of the Union's substantial ties to Ranken, failing to acknowledge that a number of the classes the Union offers to its members (and pays for) are provided through Ranken.

2. <u>The Carpenters' Joint Training Fund</u>.

The Carpenters' Joint Training Fund (the "Trust Fund") is the legal entity created by the Union to meet its obligations under the Union's Constitution and By-laws regarding apprenticeship programs (TR 294). The Trust Fund is required to annually file a Form 990 with

the Internal Revenue Service. The Form 990 is submitted by, and on behalf of, the Trust Fund, and covers all apprenticeship programs, including the Associated Electrical Contractors/Local 57 Joint Apprenticeship Program and the Carpenters' Joint Apprenticeship Program, because the apprenticeship programs are not legal entities in and of themselves (TR 145, 294; *see* EX 8). Under the terms of the Union's bylaws, the Trust Fund's Form 990 denominates Terry Nelson—the Union's Executive Secretary-Treasurer—as the Fund's Principal Officer (TR 62; EX 2, 8). The apprenticeship programs are housed at the Nelson-Mulligan Carpenters' Training Center[10] ("Carpenters' Training Center") located at 8300 Valcour in St. Louis County, Missouri (TR 68). The facility was purchased with a loan from the Carpenters' Union, which remains outstanding (TR 230, 293; EX 3 – 7; UX 5).

Although the Regional Director acknowledged that the training facility was purchased with a loan from the Carpenters' Union, he ignores the complex financial transactions between the Union and the Trust Fund that demonstrate their close relationship. According to the Union's 2006 LM-2 Labor Organization Annual Report ("LM-2") filed with the Department of Labor, there was an outstanding loan of $990,840 (owed by the Trust Fund to the Union) at the beginning of the report period for the purchase of the land and building for the Nelson-Mulligan Carpenter's Training Center (EX 3, p. 5). Additionally, the 2006 LM-2 reflects payments[11] to the Trust Fund of more than $65,000 (EX 3, pp. 7-8). According to the Union's 2007 LM-2, $962,317 of the loaned amount was outstanding at the beginning of the reporting period and the

[10] The signage on the building references the Union—not the Trust Fund. In fact, it expressly states, "Nelson-Mulligan Carpenter's Training Program" (TR 68; EX 42). The Union holds the training facility out to the world as being owned and operated by the Carpenters' Union—there is no mention of any fund or management interest in the property or the programs housed there. The Union's protestations at the hearing to the contrary are belied by its public efforts to brand the Valcour facility as its own.

[11] These "payments" by the Union to the Trust Fund, reflected in the LM-2s, oftentimes represent monies paid by the Union to the Trust Fund as tuition for Union members for training classes taken (TR 231-32). According to the Union's 2006 through 2010 LM-2s, the Union has made payments in excess of $400,000 for such training (EX 3 – 7).

Union made payments to the Trust Fund in excess of $48,000 (EX 4, pp. 5-6). The Union's 2008 LM-2 indicates a total of $932,161 of the loaned amount was outstanding at the beginning of the reporting period and the Union made payments to the Trust Fund in excess of $62,000 (EX 5, pp. 4-5). Under the Union's 2009 LM-2, $900,279 of the loaned amount was outstanding at the beginning of the reporting period and the Union made payments to the Trust Fund in excess of $150,000 (EX 6, pp. 5, 7, 9). Finally, the Union's 2010 LM-2 indicates $866,571 of the loaned amount was outstanding at the beginning of the reporting period and the Union made payments to the Trust Fund in excess of $109,000 (EX 7, pp. 4-5).

Although the reports reflect the Trust Fund made payments to the Union regarding the loan during these periods, the loan payments were completely eclipsed by the Union's other payments to the Trust Fund (*see* EX 3-7). In Fiscal Year (FY) 2006, the Trust Fund paid $28,523 on the loan (EX 3). In FY 2007, the Trust Fund paid $30,156 on the loan (EX 4). In FY 2008, the Trust Fund paid $31,882 on the loan (EX 5). In FY 2009, the Trust Fund paid $33,706 on the loan (EX 6). In FY 2010, the Trust Fund paid $33,795 on the loan (EX 7).

a. Associated Electrical Contractors/Local Union No. 57 Joint Apprenticeship Program.

The Associated Electrical Contractors/Local 57 Joint Apprenticeship Program is one (1) of four (4) apprenticeship programs based out of the Nelson-Mulligan Carpenters' Training Center (TR 68, 145).[12] The apprenticeship program has been approved by the U.S. Department of Labor (TR 80; EX 23). The program was registered with the Department of Labor in November 2008 and classes began in January 2009 (TR 91). The program has eighty-seven (87) apprentices currently enrolled (TR 88).

[12] Local Union No. 57 is affiliated with the Carpenters' District Council of Greater St. Louis and Vicinity (TR 128).

The program maintains a number of articulation agreements with educational institutions for advance credit for associate's degree programs (TR 124; UX 12-16). The program does not have an articulation agreement with Vatterott (TR 372)—a fact conveniently ignored by the Regional Director. The apprenticeship program advertises for students (TR 77-78). In addition to running commercials during Cardinals' games, brochures detailing the program are available and distributed at job fairs (TR 77-78). The brochure was developed by Mike Short, the Coordinator of the AEC/Local 57 Joint Apprenticeship Program, and Christy White—an employee of the Union and the Union's Public Relations Director (TR 99). White also assisted in the production of the video advertisement. Specifically, Short testified at the hearing that, "She hired the crew and – you know, that shot the commercial" (TR 137). These facts were not only ignored by the Regional Director but are highly significant in that they illustrate that the these seemingly separate entities are more related than a quick and cursory look might disclose.

Short has held the Coordinator position since the program's inception (TR 51).[13] Short is also a long-term member of the Union (TR 50). In fact, Short has been a member of the Union for nearly twenty (20) years (TR 50). Before being appointed Coordinator of the AEC/Local 57 Joint Apprenticeship Program, Short was a carpentry instructor at the Carpenters' Joint Apprenticeship Program (TR 54). Dr. Gaal, the Union's Director of Training and Workforce Development, selected Short and informed him that he had been hired as the Coordinator of the AEC/Local 57 Joint Apprenticeship Program (TR 55, 111). Although Short's testimony in this regard was unrebutted, the Regional Director blatantly ignores this fact, characterizing Dr.

[13] As Coordinator, Short reports directly to the Joint Apprenticeship Committee, which is composed of two (2) management members and two (2) labor members (TR 57). The labor members are Terry Nelson, the Union's Executive Secretary-Treasurer, and Al Bond, the Union's Assistant Executive Secretary-Treasurer (TR 57). The two (2) alternate labor members are Dominick Grasso and Scott Byrne, both of whom are business agents with the Union (TR 58). Short's paycheck is from the Carpenters' Joint Training Fund and is signed by Terry Nelson (TR 134).

Gaal's relationship with the apprenticeship programs as a mere advisor (DDE, p. 6). Again, this further establishes the extent to which the Union, the Trust Fund, and its associated apprenticeship programs are inextricably intertwined.

The AEC/Local 57 Joint Apprenticeship Program has been allotted only one percent (1%)—approximately 400 square feet of space consisting of Short's office and one (1) classroom—at the Union's Valcour Avenue training center (TR 67). The program's classroom and lab-based training occurs primarily at Ranken, where job-site skills are taught in a controlled environment (TR 67). Importantly, when Dr. Gaal, the Union's Director of Training and Workforce Development, reviewed the program, he noted that it was virtually identical to Ranken's associate degree electrical program (TR 244). The trades-based training offered by the AEC/Local 57 Joint Apprenticeship Program parallels the coursework offered at Vatterott. Only one week of classroom training takes place at the Carpenters' Training Center; the balance (seventeen (17) weeks) takes place at Ranken (TR 58, 75). With the exception of the first week of training, classes are taught by Dan Fitzsimmons, who is employed by Ranken (TR 65). While students are attending classes at Ranken, Short frequently conducts administrative business relating to the operation of his program on Ranken's premises (TR 69).

Before the apprenticeship program was approved by the U.S. Department of Labor ("DOL"), Short and Dr. Gaal (an admitted Union agent and Union Executive Board member) attended meetings with personnel from Ranken to discuss curriculum developed by Ranken for the program (TR 83, 85, 245-46). Although the Regional Director acknowledges that Dr. Gaal played a role in the development of the AEC/Local 57 Joint Apprenticeship Program's curriculum, he minimizes Dr. Gaal's involvement (DDE, p. 13). Record evidence established Dr. Gaal reviewed the proposed "Pathway" before it was submitted to the DOL for approval (TR

245-46). Additionally, Dr. Gaal interacted with the Department of Labor's representatives regarding the submission (TR 245-46).[14] Importantly, although completely ignored by the Regional Director, after the Department of Labor reviewed the proposed program, it contacted Dr. Gaal—not Short or Ranken—regarding the Department's recommendations for changes to the program (TR 246). The Union also played an active role in selecting Ranken as the program's partner (TR 287). The curriculum developed by Ranken, Short and Gaal, specifically the Pathway, was incorporated into documents submitted to the Department of Labor for the program to be approved (TR 85-86).

To be admitted into the apprenticeship program, applicants must be eighteen (18) years of age, be a U.S. citizen, and obtain a high school degree within one (1) year of acceptance into the program (TR 80).[15] Additionally, an applicant must be employed or sponsored by a contractor with whom the Union has a collective bargaining agreement (TR 118). Apprentices must work for a Union contractor (TR 90). They are not allowed to work for non-signatory or non-Union contractors and could be expelled from the apprenticeship program if they work for a non-signatory or non-Union contractor while enrolled in the apprenticeship program (TR 90). Occasionally, an apprentice might lose his/her job with his/her sponsored contractor during his/her apprenticeship (TR 52). In such cases, Short will assist apprentices in securing employment with another signatory contractor (TR 53).[16] All apprentices are members of the Union (TR 51). Monthly union dues are collected from the apprentices via checkoff and paid to the District Council (TR 71).

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[14] In fact, Dr. Gaal has been involved in and interacted with the Department of Labor's officials regarding every one of the Union's apprenticeship programs (TR 246-47).

[15] The program will accept a GED in lieu of a H.S. diploma (TR 80).

[16] After apprentices graduate from the apprenticeship program, they must go through the Union for job placement assistance (TR 52). Importantly, the Union does not assist, or attempt to find employment for, individuals who are not members of the Union (TR 54).

b. The St. Louis Carpenters' Joint Apprenticeship Program.

In addition to the AEC/Local 57 Joint Apprenticeship Program, the St. Louis Carpenters' Joint Apprenticeship Program ("CJAP") is also based out of the Carpenters' Training Center. CJAP is sanctioned by the Department of Labor and regulated by the Department of Education (TR 192).[17] Two years ago, there were approximately 2,600 apprentices in the program—but this number has shrunk to approximately 700 CJAP apprentices due to the economy (TR 161). The current coordinator for CJAP is Mark Fuchs (TR 140). Fuchs has been a member of the Union since 1978 (TR 140). Prior to becoming the coordinator, Fuchs was an instructor for CJAP (TR 141). Like the AEC/Local 57 Joint Apprenticeship Program and Vatterott College, CJAP advertises on television and radio (TR 160). Moreover, Fuchs and other CJAP representatives attend high school fairs to promote the program and recruit students (TR 160). In fact, Fuchs has one (1) individual whose sole responsibility is to attend career fairs and serve as a liaison between contractors and affiliated vocational technical training centers and high schools (TR 169). Again, both Vatterott and the Union's programs advertise in the same media outlets, using the same advertising mediums, and targeting the same prospective students. Additionally, like its AEC/Local 57 counterpart, CJAP has a number of articulation agreements with technical programs, including Ranken (TR 161; *see also* UX 12-16). CJAP does not have an articulation agreement with Vatterott—a fact ignored by the Regional Director (TR 372; DDE, pp. 15-16).

Training consists of both classroom and hands-on laboratory training in a controlled environment (TR 167). The trades-based training offered by CJAP parallels the coursework offered at Vatterott. Just like the apprentices in the AEC/Local 57 Joint Apprenticeship

[17] The United Brotherhood has an International Training Fund, currently located in Las Vegas, Nevada, that develops nationwide curriculum that is utilized throughout all of the Union's training centers (TR 158).

Program, students come in for focused two-week training sessions every six (6) months (TR 162). CJAP is an eight-term program and takes approximately four (4) years to complete (TR 162). CJAP also offers training to journeyman carpenters through skill advancement courses (TR 179). These courses are primarily taught during the evening and on Saturdays (TR 179). CJAP's skill advancement courses compete with Vatterott's non-degree, non-program enrollment, which is critical to Vatterott's maintenance of its required 90-10 non-cash to cash-pay ratio (TR 364-70). Failure to maintain this ratio will result in Vatterott's loss of U.S. Department of Education funds for student financial aid (TR 366).

To be admitted into the apprenticeship program, applicants must be eighteen (18) years of age, be a U.S. citizen, and obtain a high school degree or GED within one year of acceptance into the program (TR 177-78).[18] Apprentices must be dues-paying members of the Union (TR 163) and employed by a contractor who is a signatory to a District Council labor agreement (TR 163). Apprentices must work for a Union contractor (TR 163). They are not allowed to work for non-signatory or non-Union contractors and could be expelled from the apprenticeship program if they work for a non-signatory or non-Union contractor while enrolled in the apprenticeship program (TR 163). Occasionally, an apprentice might lose his or her job with his or her sponsored contractor during his/her apprenticeship (TR 165). In such cases, CJAP will assist apprentices in securing employment with another signatory contractor (TR 165).

C. Ranken Technical College and Its Relationship with the Union.

Ranken is a private, non-profit educational institution located in St. Louis (EX 14). Ranken was founded to train students for employment in a variety of technical and mechanical occupations (EX 14). Ranken is accredited by the Higher Learning Commission and is a

[18] For students age 25 and above, completion of a series of WorkKeys assessments is accepted in lieu of a H.S. diploma or GED (TR 177-78).

member of the North Central Association of Colleges and Schools (EX 14). Like Vatterott, Ranken offers a variety of certificate, diploma, and degree programs (EX 14). Ranken offers courses of study in, *inter alia*, automotive technology and repair, architectural technology, carpentry and building technology, HVAC, plumbing technology, electrical technology,[19] information technology, industrial technology, fabrication and welding technology, and applied management (EX 14). At the hearing, the parties stipulated as follows:

> Ranken Technical College (Ranken) and the Employer represent they are technical career preparatory colleges. Ranken and the Employer recruit and compete for many of the same students and regularly provide classes and programs on similarly identified subject matters, including, but not limited to: general education; welding; computer technology; electrical mechanics; heating, ventilation, air conditioning and refrigeration; information systems; and plumbing. Graduates of Ranken and the Employer may compete for jobs with many of the same employers within the St. Louis Missouri Metropolitan area.

(Bd. Ex. 2, ¶ 9). Despite the fact that the parties agreed that Ranken is Vatterott's primary competitor in the St. Louis area, the Regional Director ignored this fact.

Admission to Ranken requires a high school diploma or GED, the completion of an application, and the payment of a non-refundable application fee (EX 14). Ranken's students, like those at Vatterott, are responsible for paying tuition for their education and financial aid is available through a number of means, including Federal Pell Grants, Federal Stafford Student Loans, Federal Parent Loans for Undergraduate Students, grants, and scholarships (EX 14). Additionally, like Vatterott, Ranken maintains articulation agreements with other colleges and universities (EX 14). Unlike Vatterott, Ranken also maintains articulation agreements with DOL-approved union apprenticeship programs, including the AEC/Local 57 Joint Apprenticeship Program and CJAP—facts blatantly ignored by the Regional Director (TR 161,

[19] Ranken's associate degree electrical program is virtually identical to the AEC/Local 57 Joint Apprenticeship Program (TR 244). At no point has the Union disputed this fact, nor could it.

191, 242, 271-72; EX 12-13). Ranken also advertises for prospective students—the same prospective students sought by Vatterott—in much the same fashion as Vatterott (TR 40). Ranken advertises on television and radio as well as print media (TR 40). In fact, Ranken placed a billboard advertising its programs approximately one (1) mile from Vatterott's NorthPark campus (TR 40). Again, the Regional Director ignored these facts.

Importantly, Ranken has a long-standing relationship with the Union—a fact ignored by the Regional Director (TR 242).[20] Most recently, the Union selected Ranken as its partner for the AEC/Local 57 Joint Apprenticeship Program (TR 287). In this respect, Ranken provides customized training for AEC/Local 57 apprentices (TR 309). Development of curriculum for the AEC/Local 57 Joint Apprenticeship Program was a "collaborative effort" between Ranken and the Union (TR 317).

Dan Fitzsimmons, the Division Chair for Ranken's electrical programs, is the instructor for AEC/Local 57 apprentices (TR 65). Unlike other instructors in the AEC/Local 57 Joint Apprenticeship Program, however, Fitzsimmons is not a member of the Union or any other labor organization (TR 65, 315-16). In fact, none of Ranken's employees are represented by the Union or any other labor organization (TR 229). Additionally, Ranken also provides training to Union members in the form of continuing education or skill advancement classes paid for by the Union (TR 106). The cost for these classes varies depending on the length of the course, but generally runs between $400 and $700 per student (TR 106).

[20] Interestingly, the relationship between Ranken and the Union is further evidenced by the fact that Dr. Gaal, the Union's Director of Training and Workforce Development, also sits on the advisory panel for Ranken's four (4) year Bachelor of Applied Management degree program. The Regional Director *minimizes* the importance of this fact, characterizing Dr Gaal's involvement on Ranken's advisory panel as "not [being] a function of his position as the [Union's] Director of Training and Workforce Development" (DDE, p. 7).

V. ANALYSIS

A. The Regional Director Erred by Failing to Conclude that the Union Is a Business Rival of Vatterott and His Decision Constitutes a Departure from Applicable Board Precedent.

1. Petitioner Must Be Disqualified from Representing Vatterott's Employees Because It Is a Business Rival.

The Regional Director failed to apply salient Board precedent. It is well-settled that a union is not a proper bargaining representative of employees of an employer with whom it competes as a business rival. *Bausch & Lomb Optical Co.*, 108 NLRB 1555, 1558 (1954). The Regional Director failed to follow this long-standing precedent in his Decision and the Board should grant review to properly apply the correct Board standard. The Regional Director, however, erred by narrowly construing the Board's decision in *Bausch & Lomb*.

In this respect, the Regional Director erroneously concluded that "the Petitioner is clearly not engaged in the business of providing diploma and degree educational programs to the general public and [therefore] is not a direct business competitor of the Employer" (DDE, p. 20). The threshold question under the standard, however, is whether there are two entities competing in the same marketplace to provide a ***similar*** service or sell a ***similar*** product. Notwithstanding the Regional Director's erroneous characterization, the facts clearly establish that Vatterott and the Union's apprenticeship program are engaged in providing ***similar*** training and compete for the very same students.

Although ignored by the Regional Director, Vatterott considers union apprenticeship programs generally, and the Carpenters' Union's programs specifically, as substantial competitors for students interested in pursuing vocational education (TR 200, 334, 337, 347, 358). The Union's apprenticeship programs and Vatterott compete for the same prospective students and even market their programs to similar groups of prospective students. Both

Vatterott and the Union use the same mediums (T.V. advertising, billboards, print ads, etc.) and the same outlets, *i.e.*, advertising with the St. Louis Cardinals to advertise their respective vocational training programs. In fact, apprenticeship programs, generally, and the Carpenters' Union's apprenticeship programs, specifically, have taken students who were simultaneously completing their education at Vatterott. Even more importantly, the Union has allowed transfers from Vatterott into their programs. The evidence at the hearing demonstrates the apprenticeship programs are created by the Union in accordance with the International Constitution, directly overseen by Union officers, and funded through collective bargaining agreements negotiated by the Union. These apprenticeship programs recruit students for instruction in the very same subjects and skills as does the Employer. The overlap in instruction is not simply in a few courses. The overlap is substantial.[21]

With respect to the AEC/Local 57 Joint Apprenticeship Program, the topics covered in the Union's apprenticeship program are the **same topics** covered by Vatterott (although Vatterott's instructors cover those topics in more detail).[22] With respect to CJAP, Vatterott teaches many of the **same skills** that can be acquired in the Union's apprenticeship program. A student choosing to enter one of the Union's apprenticeship programs, instead of choosing to attend Vatterott, results in a *direct* loss of revenue in the form of tuition for the Employer and a *direct* benefit to the Union in the form of dues, initiation fees, and increased employer

[21] In his decision, the Regional Director minimized the similarities between Vatterott's programs and those of the Union's apprenticeship programs. *See* DDE, p. 22. The Regional Director contends that overlap exists only with respect to the Employer's electrical mechanics program and the Union's AEC/Local 57 Joint Apprenticeship Program. Although the Regional Director is correct in his conclusion that Vatterott does not have a "separate carpentry diploma or degree program," the fact remains that Vatterott teaches much of the same core curriculum in its programs as taught in the apprenticeship programs. Even more importantly, *complete* overlap is not a prerequisite to finding that the Union and its associated apprenticeship programs constitute a business rival under relevant Board law.

[22] The Union, however, discourages individuals from attending Vatterott by offering only *partial* credit for the Vatterott degree, despite the fact that Vatterott's program is more comprehensive and offers greater topical coverage than the AEC/Local 57 Joint Apprenticeship Program.

contributions. Moreover, the Union's membership growth is directly tied to enrollment in its apprenticeship programs.

The Union's apprenticeship programs are not temporary endeavors or simply a plan to create a training program; rather, they have existed, in some cases, for almost as long as the Union itself. In fact, an apprenticeship system is one of the core objects of the Union's Constitution. District Councils are mandated to develop and implement programs complying with the apprenticeship standards set forth by the United Brotherhood (TR 59; EX 1). Both of these facts were readily acknowledged by the Regional Director (DDE, p.7). New students entering the apprenticeship programs result directly in increased dues and fees for the Union. Every student entering Vatterott generates revenue in the form of tuition.

Moreover, the market drives the recruitment efforts of both Vatterott and the Union's apprenticeship programs. If the Union's apprentices and members are unemployed, fewer apprentices are admitted or recruited into the apprenticeship program. The influx of Vatterott's graduates into the market has a direct impact on the need of contractors to hire apprentices and, thus, has a direct and negative impact on the Union's growth and continued viability.

Similarly, if Vatterott cannot place graduates into positions with employers, the success of its programs suffer. Indeed, if Vatterott fails to place 70% of its graduates, it will lose ACCSC accreditation (TR 19-20). The Union has a vested interest in seeing its apprentices and members employed, at the direct expense of Vatterott and its graduates.

The criteria for admission into the Union's apprenticeship program and Vatterott are virtually identical (TR 80, 177-78, 364). Each requires a completed application and a high school diploma or GED (TR 80, 177-78, 364). Both Vatterott and the Union's apprenticeship programs utilize classroom instruction and hands-on learning (TR 30, 67, 387). Each school is

located in the St. Louis metropolitan area with additional campuses around the St. Louis metropolitan area.

Although the Union does not teach all of the same subjects, *e.g.*, Cosmetology and Computer Networking, the standard is not whether Petitioner competes with Employer in *all* aspects. The relevant consideration is whether Petitioner competes with the Employer, ***in any respect***. The Regional Director attempts to make much of the fact that there is not a complete overlap. In his DDE, the Regional Director noted the Employer does not offer a "*separate* carpentry diploma or degree program" (DDE, p. 22). Although the Regional Director acknowledged that Vatterott does provide instruction in basic carpentry skills, he ignored or minimized the fact that Vatterott's trade programs cover a substantial amount of the material covered in the CJAP program, including, health and safety, fall protection, shop safety, residential framing and finishing, wall framing, roof framing, engineered roof trusses, stair building, framing with metal, rough interiors and finished interiors, blueprint reading and specifications, mathematics, and material handling (TR 404-20). Even more significant, Vatterott's course offerings regarding its Electrical Mechanics program cover the **exact same topics** as those covered in the AEC/Local 57 Apprenticeship Program. Vatterott provides more in-depth instruction in these areas, however, *exceeding* that provided in the AEC/Local 57 Apprenticeship Program.

As the Board stated in *Bausch & Lomb*, "the Union's position at the bargaining table as a representative of the Respondent's employees while at the same time enjoying the status of a business competitor renders almost impossible the operation of the collective bargaining process." 108 NLRB 1559. The Union owes complete loyalty to those it represents. Where the Union becomes the Employer's business rival, it "create[s] a situation which would drastically

change the climate at the bargaining table from one where there would be reasoned discussion in a background of balanced bargaining relations upon which good-faith bargaining must rest to one in which, at best, intensified distrust of the Union's motive would be engendered." *Id.* at 1561.

Not only is the Union a stand-alone business rival, it has a deep financial and organizational relationship with Ranken. Although the Regional Director erroneously concluded that the nature of the relationship between the AEC/Local 57 Joint Apprenticeship and Ranken was "arms-length," a review of the actual facts clearly illustrates that without Ranken—which provides the overwhelming majority of classroom and lab-based training for the Union's electrical apprentices as well as the requisite expertise to offer such training—the Union could not offer the AEC/Local 57 Joint Apprenticeship Program. Ranken developed the AEC/Local 57 Joint Apprenticeship Program curriculum with Dr. Gaal and Short (TR 83, 85, 245-46). At hearing, John Wood, Ranken's Vice President for Student Services, described the development of the curriculum for the program as a "collaborative effort" between Ranken, Short, and Gaal (TR 317). And, even more telling, the curriculum developed was virtually identical to Ranken's associate degree electrical program (TR 244). To reach his conclusion, the Regional Director ignored the long-standing relationship between the Union and Ranken. Moreover, this relationship is not limited to Ranken providing the classroom portion of the AEC/Local 57 Joint Apprenticeship Program. The Union provides ongoing journeymen training to its members through Ranken. As Vatterott's offer of proof amply illustrates, the Union's close and ongoing business relationship with Vatterott's single largest competitor further accentuates its status as a rival.

Here, as in *Bausch & Lomb*, the "Union cannot help being cognizant of the adverse effect that the good business fortunes of its [apprenticeship programs] can have upon those of Respondent as its competitor and vice versa. Indeed success of one could well mean the failure of the other." *Id.* at 1560. Clearly, any future certification of Petitioner would create the same situation where the Union's status as a rival of Vatterott would create the same "intensified distrust" that makes good faith bargaining impossible.

Interestingly, the Regional Director also erroneously concluded that Petitioner "is not directly engaged in a business similar to the Employer [but,] rather, as stipulated by the parties, is a Section 2(5) labor organization with 24,000 members covering a geographical area of three states and thus is not a business competitor of the Employer" (DDE, p. 18). In so concluding, the Regional Director seems to indicate that because the Union is a labor organization, it follows that it cannot be a business rival of an employer. Obviously, this is incorrect. The Union's status as a Section 2(5) labor organization has no bearing whatsoever on whether it is a competitor of Vatterott. Not only is the Regional Director's characterization of and reliance on the Union's status as a Section 2(5) labor organization erroneous, if it were actually reflective of extant Board law, it would completely foreclose the possibility of any labor organization ever being a business rival of an employer. Stated somewhat differently, the Regional Director's position is not only contrary to salient Board precedent, it turns the business rival concept and conflict of interest doctrine on its head.

Additionally, the Regional Director erroneously calculated that "less than one-half of one percent of Petitioner's total membership" is currently enrolled in the Union's apprenticeship programs. Approximately 1,157—or 4.8%—of the Union's roughly 24,000 members are

enrolled in its apprenticeship programs. As such, the Union's apprenticeship programs and NorthPark have comparable enrollment.

Finally, the Regional Director erroneously concluded that the Union's apprenticeship programs were not direct competitors of Vatterott because the Union's apprenticeship programs are governed by Department of Labor standards while Vatterott's diploma and degree programs are governed by Department of Education guidelines, and that the duration of the programs are different (several years versus 60 or 90 weeks). *See generally*, DDE, p. 26. Although Vatterott's programs and the Union's apprenticeship programs are regulated by different governmental entities and vary in duration, it does not follow that they are not direct competitors as contended by the Regional Director. Both Vatterott and the Union's apprenticeship programs provide the same core vocational training. The minor differences relied on by the Regional Director do not change this fact.

Regarding accreditation, it is important to note that the Union's AEC/Local 57 Joint Apprenticeship Program is a virtual mirror image of Ranken's Electrical Mechanics program, which is governed not by the Department of Labor but, rather, the Department of Education, and accredited by the North Central Association Higher Learning Commission. Simply stated, these are distinctions without a difference. Similarly, Vatterott's career services and job placement generally occur after a student has received his or her education and training while apprentices must generally be employed with signatory contractors during their education and training. Although the Union seeks to find its apprentices employment with signatory contractors on the front end, there are times that apprentices become unemployed during their apprenticeship. Notwithstanding this fact, their training continues and the Union attempts to find other employment for them. Likewise, although Vatterott generally offers job placement and career

services guidance following completion of its programs, these services are also offered to students during the course of the education and training. Similarly, both Vatterott's programs and the Union's apprenticeship programs are open to the general public. In this respect, Dr. Gaal testified that the Union's apprenticeship programs, and specifically the AEC/Local 57 Joint Apprenticeship Program, were "random access open entry programs" (TR 249). In concluding that the Union's apprenticeship programs were not direct competitors of Vatterott, however, the Regional Director ignored the most important and vital fact—the product is the *same* even though the delivery might be somewhat different.

2. Petitioner Is NOT Separate from the Apprenticeship Programs or Joint Training Fund.

The Regional Director not only blatantly ignored or minimized facts but also failed to follow extant Board precedent in erroneously concluding that the Union and its associated apprenticeship programs are "separate and distinct organizations" and that the Union does not dominate or control the apprenticeship programs. Among other things, the Regional Director heavily relied on the fact that the Union and its associated apprenticeship programs are "located in different facilities, file separate and distinct tax and DOL forms, have separate Federal Tax identification numbers, and submit to and pay for separate audits"[23] (DDE, p. 19). Although true, when considered in light of *all* of the relevant evidence, the Regional Director's conclusion is erroneous for at least two reasons.

First, the Union creates, manages, markets, and funds the apprenticeship programs to the point of exercising near total control over them. In *Bausch & Lomb*, the petitioning unit created a separate legal entity from the union that engaged in the business of selling similar products to

[23] The Regional Director correctly pointed out the fact that the audits are performed by the same auditors (DDE, p. 8). In doing so, however, the Regional Director erroneously placed his reliance on the very technicalities of corporate structure that the Board has long held do not trump the realities of the workplace.

those sold by Bausch & Lomb. 108 NLRB at 1558. The conflict of interest doctrine, however, is not limited to cases where a union and an employer are engaged in the *same* business. *St. John's Hospital & Health* Center, 264 NLRB 990, 991 (1982).

> [A]s the Board pointed out in *Bausch & Lomb Optical Company*, the union was disqualified from acting as a collective-bargaining representative not because it was in the same business as the employer, but because its business activities interfered with the union's "single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent."
>
> Similarly, in *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971), the Board found that a union seeking to represent employees of a grocery store was disqualified from acting as a collective-bargaining representative because one of its agents had interests incompatible with the union's disinterested representation of the petitioned-for employees. The business agent had a financial interest in an enterprise that potentially might have sought to do business with the employer. . . . *Thus, it is clear that a union may be disqualified from representing an employer's employees when an enterprise controlled and dominated by the union engages in business with the employer as well as when an enterprise controlled and dominated by the union engages in direct competition with the employer.* In both situations, potential financial conflicts interfere with the union's "single-minded purpose of protecting and advancing the interests of the employees who have selected it as their bargaining agent."

St. John's Hospital & Health Center, 264 NLRB at 992-93 (emphasis supplied). *See also Guardian Armored Assets, LLC*, 337 NLRB 556, 558 (2002). In determining whether a union "controls" an enterprise, the issue is the degree to which the union and the enterprise are intermingled. *Visiting Nurses Ass'n Inc.*, 254 NLRB 49, 51 (1981). Stated somewhat differently, the question is whether the entity is "a creature of" the union. *Id.*

The Trust Fund's status as a legally separate entity *on paper* is irrelevant here just as it was in *Bausch & Lomb*. What is critical is that the Trust Fund and the apprenticeship programs are "creatures of" the Union. Clearly, as the record evidence demonstrates, the Trust Fund and the apprenticeship program were "created" by the Union pursuant to the mandate of the United Brotherhood's Constitution—a fact acknowledged by the Regional Director (DDE, p. 7).

The Union's Executive-Secretary and other Union officers play key roles with respect to the Trust Fund and the apprenticeship programs. For example, the Regional Director completely ignored the fact that the Union's Executive Secretary-Treasurer, *i.e.*, Terry Nelson, has the ***exclusive*** power and authority to ***appoint and remove*** labor representatives to act as trustees for all negotiated employer/union trust funds, including apprenticeship and training funds (TR 62; EX 2).[24] Rather, the Regional Director *minimizes* Nelson's true authority by noting that these trustees "are elected to their trustee positions by the 300 delegates of the Petitioner and thus are subject to being voted out" (DDE, p. 18). Stated somewhat differently, but for the Union, the Trust Fund and apprenticeship programs would not exist. Not surprisingly, Dr. Gaal, the Union's Director of Training and Workforce Development, used the pronouns "we" or "our" more than thirty (30) times while testifying about the Union and the Trust Fund and apprenticeship programs. Moreover, although completely ignored by the Regional Director, Dr. Gaal obtained the documents that he brought with him to the hearing regarding the Trust Fund and apprenticeship programs *without* a subpoena—he simply made a verbal request (TR 299). Likewise, the Union and the Trust Fund utilize the same auditors—Wolfe Nilges Nahorski, P.C. (TR 253, 257; UX 3, 5). To reach his conclusion that the Union and its associated apprenticeship programs are "distinct and separate," the Regional Director either minimized or completely ignored these significant and telling facts.

Second, the Union is sufficiently affiliated, *i.e.*, intermingled, with the apprenticeship programs and the Trust Fund administering them under extant Board law as to cause the disqualification. The Regional Director's conclusion that the Union is a separate entity from the

[24] In pertinent part, the Union's By-Laws and Trade Rules expressly provide: "The Executive Secretary-Treasurer shall have the power and authority to appoint and remove representatives from and on behalf of its Local Unions to act as Trustees for all negotiated Employer/Union Trust Funds including . . . Apprenticeship [trust funds]" (EX 2, p. 10).

Trust Fund and the apprenticeship programs does not *ipso facto* mean that the Union is not a business rival of Vatterott. In *Visiting Nurses*, the Board disqualified the California Nurses Association from representing certain employees because of the union's *affiliation* with a competitor of the employer. 254 NLRB 49 (1981). *See also St. John's Hospital and Health Center*, 264 NLRB 990 (1982) (same). The petitioner in *Visiting Nurses* was comprised of ten (10) regional associations including the Alameda County Nurses Association ("ACNA"). *Id.* at 50. The ACNA, in turn, created an entity called Nurses Professional Registry, Inc., that employed health care practitioners and acted as a placement agency in the Alameda County area. *Id.* The Board examined the ties between the Registry and the ACNA and found the following critical connections: (1) the two shared office space for a time before moving into a building where they occupied adjacent floors; (2) the Registry attempted to have the petitioner include clauses[25] in collective bargaining agreements that would benefit the Registry; (3) the ACNA's Bylaws previously required the ACNA's President and Treasurer to be members of the Registry's Board of Trustees, and gave the ACNA's Board of Directors the right to appoint four (4) members to serve on the Registry's Board of Trustees; and (4) the President of the ACNA was also a member of the Registry Board of Trustees. *Id.*

The connections between the Union and the Trust Fund and apprenticeship programs in the instant case equal, if not exceed, those present in *Visiting Nurses*. As more fully explained above, (1) the Union created the Trust Fund and the apprenticeship programs under its obligations in the United Brotherhood's Constitution; (2) the Union's By-Laws require the Union's Executive Secretary-Treasurer to be a trustee and the Union's Executive Secretary-Treasurer and other members of the Union's Executive Board serve on the apprenticeship

[25] Almost every collective bargaining agreement to which the Union is a party requires the signatory employer to contribute 25 cents per hour to the Trust Fund (TR 227-29). The Trust Fund uses these monies to educate persons in direct competition with Vatterott; such a clause would be predictably unacceptable to Vatterott.

committees; (3) the Union played a substantial role in the selection of Ranken as a provider for the classroom portion of its electrical apprenticeship program; (4) the parties stipulated Ranken, with whom the Union is *affiliated*, is a direct competitor of the Employer, recruiting and competing for the same students and regularly providing classes and programs on the same or similar subjects;[26] (5) the Union's Director of Training and Workforce Development selected the coordinator of the electrical apprenticeship program and informed him of the decision;[27] (6) the coordinators of the apprenticeship program and virtually all of the instructors in the programs are members of the Union;[28] (7) the Union financed the acquisition of the Carpenters' Training Center;[29] and (8) the Union developed the advertising materials utilized by the apprenticeship programs.[30]

The Regional Director, however, discounted the precedential effect of the Board's *Visiting Nurses* and *St. John's Hospital and Health Center* decisions. Again, the Regional Director, in a rather hypertechnical fashion, narrowly construed *Visiting Nurses* and *St. John's Hospital and Health Center*. The Regional Director attempted to limit those decisions by

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[26] Bd. Ex. 2, ¶ 9. One need look no further than the fact that the Union and Ranken operate an electrical apprenticeship program that utilizes Ranken's Electrical Technology Associate Degree curriculum for a concrete example of the Union's direct competition with Vatterott (TR 244). The Union's ongoing enterprise with Ranken represents a direct competitor to Vatterott's electrical program.

[27] Additionally, although ignored by the Regional Director, the Department of Labor contacted Dr. Gaal after it reviewed the proposed AEC/Local 57 Joint Apprenticeship Program regarding its recommendations for changes (TR 246).

[28] Two (2) of the six (6) adjunct instructors in the CJAP program are not members of the Union (TR 143). Full-time instructors are, however, required to be members of the Union (EX 46).

[29] Although the Regional Director acknowledged that the Union "loaned" the Trust Fund money to acquire the Valcour training facility, he ignored the complex financial transactions between the Union and the Trust Fund which are demonstrative of their close relationship (DDE, p. 9. *See also* Section IV.B.2., *supra*).

[30] The advertising brochure for the AEC/Local 57 Joint Apprenticeship Program was developed by Mike Short, the Program's Coordinator, and Christy White—the Union's Public Relations Director (TR 99). Not only did White assist in developing the brochure, she coordinated the production of the video advertisement, including hiring the filming crew (TR 137). The Regional Director ignored these significant and material facts which reflect that the Union and the Trust Fund and its apprenticeship programs are so inextricably intertwined as to require the conclusion that they are not separate and distinct entities.

pointing out that the nurse registries were *solely* governed and operated by the petitioning union and its affiliated association. The Board's test, however, is not whether an affiliated association or entity is *solely* governed by the union. Rather, it is the degree to which the Union and the entity are intermingled. As indicated above, at its core, the inquiry is really whether the entity is a "creature of" the Union. Here, it cannot be overstated that, but for the Union, the Trust Fund and the apprenticeship programs would not exist. They are clearly "creatures of" the Union and exist *solely* because of the mandate in the Union's constitution.

Additionally, the Union's ongoing business relationship with Ranken—Vatterott's direct competitor—further compels the proper conclusion that the Union is a business rival of the Employer. The Regional Director ignored the fact that Vatterott's primary competitor in the St. Louis metropolitan area is Ranken followed by the various DOL-approved union apprenticeship programs, including the AEC/Local 57 Joint Apprenticeship Program and CJAP. Moreover, the Regional Director ignored the fact that Vatterott has lost prospective students to DOL-approved union apprenticeship programs, generally, and the Union's programs, specifically (TR 46-47). These programs, most notably the AEC/Local 57 Joint Apprenticeship and CJAP, target their recruiting efforts on the very same individuals as Vatterott.

Finally, the Regional Director failed to even address the fact that the Board's joint employer, single employer, and alter ego doctrines provide a basis for holding that the Union should be disqualified from representing the Employer's employees. The Board has long held that the technicalities of corporate structures do not trump the realities of the workplace. The term "single employer" applies to situations where apparently separate entities operate as an integrated enterprise in such a way that "for all purposes, there is in fact only a single employer." *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122 (3d Cir. 1982).

For example, under a single employer analysis, the Union and the Trust Fund and apprenticeship programs share common ownership, common management, and interrelation of operations. Joint employers are business entities that are entirely separate legal entities that take part in determining the essential terms and conditions of a group of employees, and the Board will order them to jointly bargain with an employer. Finally, two enterprises, although purporting to be legally distinct and separate, will be found to be alter egos where they have "substantially identical management, business purpose, operation, equipment, customers and supervision as well as ownership." *Denzel S. Alkire*, 259 NLRB 1323, 1324 (1982); *Advance Electric*, 286 NLRB 1001, 1002 (1984).

Clearly, the record evidence demonstrates that the Union is not a separate and distinct entity from the Trust Fund or the apprenticeship programs. Instead, as illustrated above, the Union, the Trust Fund, and the apprenticeship programs are sufficiently intermingled with one another so as to disqualify the Union from representing the Employer's employees under extant Board law.

3. Petitioner Must Be Disqualified Because a "Clear and Potential" Danger of Interfering with the Bargaining Process Exists.

The Regional Director also erred in concluding that Vatterott failed to establish a "'clear and present' danger of interfering with the bargaining process" (DDE, p. 24). In so concluding, the Regional Director either misstated or misapplied long-standing Board precedent. To find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, 316 NLRB 1233 (1995). Importantly, an "employer need not demonstrate that mischief already has resulted

from a conflict, however, *but only that its potential exists*." *Garrison Nursing Home*, 293 NLRB 122, 122 (1989), *citing Bausch & Lomb*, 108 NLRB at 1562.

In *Harlem River Consumers Cooperative, Inc.*, 191 NLRB 314 (1971), the Board found the petitioning union was disqualified because the business agent had a financial interest in an enterprise that *potentially might have* created a conflict of interest. Importantly, no finding of actual abuse was made nor was it necessary; rather, " [a]s the court held in *N.L.R.B. v. David Buttrick Co.*, [399 F.2d 505, 507 (1st Cir.)], '. . . it is the innate danger to be guarded against (and) the existence of this danger does not require proof of abuse of trust, so long as there is sufficient power and temptation to commit such abuse.'" 191 NLRB at 319. Reading these cases together, Vatterott submits that the standard is more properly articulated as a "clear and ***potential*** danger."[31]

Under the above-cited Board precedent, as well as the Region's decision in *Vatterott Educational Centers, Inc.*, 14-RC-12738, Vatterott attempted to adduce evidence at the hearing illustrating that a "clear and potential" danger of interference with the bargaining process exists in this case. Hearing Officer Brigman, however, rejected outright the Employer's offer of proof and refused to allow the Employer to present any additional evidence at hearing (TR 217-18). Notwithstanding this egregious error committed by Hearing Officer Brigman, the Union did not attempt, let alone establish, that the Employer's offer of proof was erroneous.

Specifically, Hearing Officer Brigman rejected the Employer's offer of proof on the grounds that the information sought to be adduced was speculative (TR 217-18). Since Vatterott and the Union do not presently have a bargaining relationship, any evidence adduced to support the "clear and potential danger" of interference with the bargaining process would be inherently

[31] Vatterott submits that under ***either*** standard, the relevant evidence establishes Petitioner's status as a business rival justifies its disqualification from representing the petitioned-for units.

speculative in nature. Here, Vatterott, in accordance with Board precedent and, more specifically, the Regional Director's explanation and direction in Region 14's decision in *Vatterott Educational Centers, Inc.*, 14-RC-12738, attempted to introduce evidence of a "clear and potential danger" but was denied the opportunity to do so.

Holding the Employer to an evidentiary standard that inevitably requires speculation as to the nature and extent of interference with the bargaining process, while simultaneously refusing to allow it the opportunity to adduce the evidence necessary to meet such an evidentiary standard, denies the Employer administrative due process and reflects arbitrary and capricious action by the Region. In his decision, however, the Regional Director minimizes Hearing Officer Brigman's erroneous ruling and proceeds to castigate the Employer for not seeking a special appeal of the ruling (DDE, p. 25). The Regional Director goes on to conclude that Vatterott was not denied due process while at the same time stating that the Employer's evidence was prefaced on an "incorrect assumption." Based upon the Regional Director's characterization, one can only conclude that seeking a special appeal would have been an exercise in futility.

Further, the Employer was <u>not</u> required to seek a special appeal of Hearing Officer Brigman's ruling. Section 102.65 of the Board's Rules and Regulations and Statements of Procedure expressly provides that rulings by the Hearing Officer "shall be considered by the Regional Director when he reviews the entire record." Although the Employer could have specially appealed Hearing Officer Brigman's ruling, it was not required to do so. Moreover, even if the Employer has specially appealed the ruling, there is no guarantee the Regional Director would have ruled on the special appeal before the record closed—a situation

contemplated by the Guide for Hearing Officers in NLRB Representation and Section 10(k) Proceedings, p. 24.

But for Hearing Officer Brigman's errant evidentiary ruling, Vatterott sought to establish: (1) that disclosing its financial records to a union that operated its own apprenticeship programs and was directly affiliated with the Employer's predominant competitor, *i.e.*, Ranken, would seriously damage Vatterott's ability to conduct business given the proprietary and confidential nature of that information; (2) that the costs of providing certain benefits to its employees, including its lucrative tuition assistance program, are highly confidential and proprietary, and disclosing such information to the Union, which operates its own apprenticeship programs and is directly affiliated with Ranken—a primary competitor of the Employer—would inure to the detriment of Vatterott; (3) the implementation of certain instructor training programs would send a clear signal to the Union—and to Ranken by nature of the Union's relationship with Ranken—of Vatterott's future plans regarding new programs or new classes inasmuch as instructor training if often a prelude to the development of new programs or new classes; (4) the requirement to bargain over the wages, hours, and other terms and conditions of employment regarding newly-created positions for new program or new courses would again signal Vatterott's business plans, to the competitive advantage of the Union—and to Ranken by nature of the Union's relationship with Ranken—and to the competitive disadvantage of Vatterott; and (5) likewise, the requirement to bargain regarding the elimination of programs or courses, and possible layoffs, would again send a signal to competitive programs to Vatterott's competitive disadvantage (TR 210-17).

The collective bargaining process—always an emotional and challenging process—is obviously thwarted where an employer cannot tell the union the "whole truth" at the bargaining

table. Vatterott attempted to adduce evidence that in certain circumstances Vatterott would be unwilling to disclose financial statements to the Union because of its apprenticeship programs and the Union's affiliation with Ranken (TR 210-11). Under relevant Board law, where an employer pleads poverty, it must allow a union access to its financial records and information. *NLRB v. Truitt Manufacturing Co.*, 351 U.S. 149 (1956). *See also NLRB v. Harvstone Manufacturing Corp.*, 785 F.2d 570 (7th Cir. 1986), *cert. denied*, 479 U.S. 821 (1986); *Washington Materials, Inc. v. NLRB*, 803 F.2d 1333, 1338-39 (4th Cir. 1986). Although, under certain circumstances, in order to reach agreement with a Union, avoid a strike and promote industrial peace, it might be beneficial for Vatterott to plead poverty or financial inability to pay; such would trigger the duty to disclose proprietary and confidential information—the confidential nature of which was clearly recognized by both Ranken's counsel and the Hearing Officer—to the Union and its affiliated apprenticeship program, and by extension, Ranken, that would have serious negative consequences on Vatterott's business.

Likewise, it is clear that under extant Board law, an employer is required to bargain over decisions regarding the wages, hours, and terms and conditions of employment of new positions resulting from the addition or creation of new programs. To do so, Vatterott would have to provide the Union with highly confidential and proprietary information about its future plans, thus sending a clear signal to the competition. Disclosing such information would allow the Union, and Ranken as one of its partners and training providers, to beat Vatterott to the punch in developing and implementing courses and programs similar to Vatterott's programs, to the detriment of Vatterott and its faculty. Such information might include financial data regarding pricing of programs but certainly would include information such as salaries and wage structures

for program instructors. Disclosure of this information would clearly put Vatterott at a competitive disadvantage while inuring to the benefit of its competition.

Similarly, Vatterott would have an obligation to engage in advance decisional bargaining concerning potential layoffs in light of a contemplated decision to eliminate certain programs. Again, Vatterott would be required to disclose highly confidential and proprietary information, which would put it at a competitive disadvantage while, at the same time, sending a signal to Vatterott's competitors, including the Union's apprenticeship program and Ranken.

Notably, when Vatterott's counsel attempted to adduce evidence regarding the development of pricing by Ranken for the coursework portion of the Union's electrical apprenticeship program, Ranken's counsel objected on the grounds that the information sought was "proprietary, . . . business sensitive, and . . . confidential" (TR 313). Hearing Officer Brigman immediately sustained Ranken's counsel's objection, noting she "would agree with his [Ranken's counsel's] argument that [pricing information] is proprietary in nature" (TR 313). Vatterott's counsel then inquired of Ranken's Vice President for Student Services whether it would be harmful to Ranken's business interest if he disclosed *how* the pricing was computed (TR 313). Ranken's counsel objected again and Hearing Officer Brigman immediately sustained it, remarking "I think we are still hammering at the same questions that they have an interest in protecting this proprietary information" (TR 314). In light of the Employer's rejected, but unrebutted, offer of proof, the sustained objections of Ranken's counsel, and the acknowledgments by Hearing Officer Brigman, it is clear that the possibility of divulging such confidential and proprietary information in the context of collective bargaining negotiations presents the "clear and potential" danger required by the Board to disqualify Petitioner in the instant case.

The Union's ongoing and substantial financial support for competitive educational enterprises presents yet another clear and potential threat to the bargaining process. Almost every collective bargaining agreement negotiated by the Union contains a mandatory contribution requirement for the Trust Fund (TR 229).[32] The Trust Fund uses these Employer contributions to design and teach programs that compete with Vatterott's programs and to pay Ranken for its services performed as the Trust Fund's educational partner. Should the Union be certified as the bargaining representative of Vatterott's faculty, a clause requiring contributions to the Trust Fund will be predictably unacceptable to Vatterott, interfering, at the outset, with the likelihood of smooth negotiations for a first contract.

The Union also funds competitive educational enterprises through dues money received from member employees. There is nothing to suggest that the Carpenters' Union, if certified herein, would propose an open shop and would be content to collect union dues themselves, rather than through checkoff. It is a fundamental tenet of labor relations that a union shop clause and a dues checkoff clause are vitally important to a union. *Local Union No. 9639, United Mine Workers of America and Local No. 5741, United Mine Workers of America (Beth-Elkhorn Corp.)*, 284 NLRB 323 (1987), *affirmed Local Union No. 5741, United Mine Workers of America v. N.L.R.B.*, 865 F.2d 733 (6th Cir. 1989) (noting that "[d]ues payments of its members are the economic life blood of a labor organization and normally its primary source of income"). Anyone with any expertise in labor relations clearly understands that, if certified, the Carpenters' Union will demand to impasse and to strike both a union shop clause and a dues checkoff clause. A union shop clause and a dues checkoff clause would be predictably unacceptable to Vatterott in view of the record evidence that Union dues are used to pay the tuition of Union members at

[32] The Union did not introduce *any* collective bargaining agreements that did not include a mandatory contribution for training.

Ranken and in other competitive educational pursuits. Allowing the Carpenters' Union to represent Vatterott's instructors would set up initial negotiations for failure.

The Regional Director, however, erroneously ignored all of this evidence. Instead, the Regional Director contended that "[t]he Employer has not established that the Petitioner would in any way alter its bargaining proposals to benefit its apprentice program" (DDE, p. 24). Not only did the Hearing Officer's ruling shutter the Employer's ability to put on any such evidence, the Regional Director erred by focusing solely on what he speculates the ***Union*** might do during negotiations. The Regional Director's focus is myopic inasmuch as negotiations are very much a two-way street—a concept readily acknowledged by the Board. Stated somewhat differently, it matters not what the Union would do (nor would the Employer ever be in a position to know what the Union would or would not do) because it is sufficient that the Employer has articulated how the Union's status as a competitor would affect its proposals.

B. In the Alternative, a Substantial Question of Law and Policy Has Been Raised Because of the Absence of Board Precedent Directly Addressing the Conflict of Interest Doctrine in the Context of Union Apprenticeship Programs and Vocational Educational Institutions.

Vatterott submits that *Bausch & Lomb* and its progeny properly control the issue of whether the Petitioner should be disqualified from representing the Employer's employees and that the Regional Director deviated from that precedent. In the alternative, Vatterott's Request for Review should be granted because a substantial question of law and policy has been raised by the absence of Board precedent directly on point. The undersigned have been unable to find any cases, and the Regional Director failed to cite any, where a union has sought to represent instructors at a vocational/trade school. Further, the undersigned has been unable to find any cases, and the Regional Director failed to cite any, where the question of whether an apprenticeship program of a petitioning union is a business rival of the vocational/trade school

offering identical programs to those offered through the petitioner's apprenticeship programs. The Employer's Request for Review should be granted to address this issue of first impression.

The Board's business rival standard should be applied to trade unions operating active apprenticeship programs that seek to represent instructors or other employees at vocational/trade schools offering education and instruction in the trade jurisdiction of the petitioning union. The conflicts inherent in such a bargaining relationship are clear on their face and preclude good faith bargaining. Such a policy would not deprive employees at vocational schools of union representation as there are numerous unions that either do not operate apprenticeship programs or do not operate apprenticeship programs that teach the same subjects taught by a vocational school.

C. The Hearing Officer's Erroneous Rulings Regarding Vatterott's Offer of Proof and Evidence of a Clear and Potential Danger Resulted in Prejudicial Error.

As discussed more fully above, Hearing Officer Brigman's erroneous rulings regarding Vatterott's offer of proof and attempt to offer evidence of a clear and potential danger in accordance with extant Board law resulted in prejudicial error. Importantly, at the close of evidence on the first day of hearing and prior to Vatterott's offer of proof, Hearing Officer Brigman indicated to the parties that she was going to address the issue of admissibility of the Employer's ability to offer evidence regarding the aspect of the Union's status as a rival and its relationship as a partner with Ranken. The Regional Director, as noted above, attempts to minimize the ultimate impact of these erroneous rulings by claiming that the Employer should have specially appealed Hearing Officer Brigman's rulings.

First, seeking a special appeal would have merely been an exercise in futility as Hearing Officer Brigman had already indicated to the parties that she intended to discuss the propriety

and admissibility of such evidence with her superiors. Second, in the same breath, the Regional Director concluded that Vatterott was not denied due process because it failed to specially appeal while remarking that Vatterott's evidence was based on an "incorrect assumption" that the Union and its apprenticeship programs were sufficiently intermingled. Finally, although the Board's Rules and Regulations and Statements of Procedure allow for a special appeal, it is not required. As Section 102.65 expressly provides, rulings by the Hearing Officer "shall be considered by the Regional Director when he reviews the entire record."

Likewise, the Employer attempted to introduce evidence regarding the interchange of employees between Vatterott and Ranken. Such evidence is further proof that Ranken is a competitor of Vatterott. Although Hearing Officer Brigman rejected Vatterott's counsel's offer of proof, several of Ranken's employees were formerly employed by Vatterott. This evidence clearly demonstrates that Ranken is a business rival of Vatterott. *See generally*, TR 198-99. Moreover, it strengthens the Employer's position that the Union, by nature of its close, long-standing relationship and association with Ranken, should be disqualified as a business rival. By preventing Vatterott from presenting such evidence, Hearing Officer Brigman's ruling was clearly erroneous and prejudicial.

D. The Regional Director Prejudicially Affected Vatterott's Rights When He Erred by Ignoring or Otherwise Minimizing Significant, Material Facts and Misapplying Extant Board Law.

Finally, Vatterott submits that the Regional Director ignored or minimized significant, material facts, and that his actions not only resulted in the Regional Director misapplying extant Board law but also prejudicially affecting Vatterott's rights. As more fully discussed above, the Regional Director erred by ignoring or minimizing material facts on a number of occasions.

These errors resulted not only in a misapplication of Board law, and, thus, the wrong conclusion, but also prejudicially affected Vatterott's rights.

VI. CONCLUSION

For the reasons set forth above, the Employer respectfully requests that the instant Request for Review be granted because a substantial question of law or policy has been raised because of the Regional Director's departure from existing Board precedent or, in the alternative, because of the absence of Board precedent. Assuming *arguendo*, but incorrectly, the Board determines the Regional Director did not depart from existing Board precedent, Vatterott submits that there exist compelling reasons for reconsideration of the Board's policy regarding the conflict of interest doctrine and the requisite burden of demonstrating a "clear and potential" danger when applied to trade and vocational educational programs and union apprenticeship programs. Further, Vatterott respectfully requests that once the Request for Review is granted, the Board dismiss the Petition based upon the Petitioner's status as a business rival of the Employer.

Respectfully submitted,

THE LOWENBAUM PARTNERSHIP, L.L.C.

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Attorneys for Vatterott College—NorthPark

Dated: February 11, 2011

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 11th day of February 2011, a copy of Vatterott College—NorthPark's Request for Review of the Regional Director's January 31, 2011 Decision and Direction of Elections was served via e-mail by consent of the party being served in accordance with Section 102.114 of the Board's Rules and Regulations to:

Mr. Charles W. Bobinette, Esq.
Uthoff, Graeber, Bobinette & Blanke
906 Olive Street, Suite 300
Saint Louis, Missouri 63101

And filed electronically with the National Labor Relations Board and the Regional Director of Region 14 via the Agency's website.

/s/ Corey L. Franklin

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 14

VATTEROTT EDUCATIONAL CENTERS, INC.

Employer[1]

and Case 14-RC-12813

CARPENTERS' DISTRICT COUNCIL OF
GREATER ST. LOUIS AND VICINITY

Petitioner

REGIONAL DIRECTOR'S DECISION AND DIRECTION OF ELECTIONS

The Employer, Vatterott Educational Centers, Inc., is a for-profit career college. The Petitioner, Carpenters' District Council of Greater St. Louis and Vicinity, filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act seeking to represent all instructors employed at the Employer's NorthPark Campus in Berkeley, Missouri. A hearing officer of the Board held a hearing, and the parties filed briefs with me, which I have carefully considered.

The parties stipulated that there are two units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act, one unit consisting of all full-time instructors and another unit consisting of all adjunct and part-time instructors employed at the Employer's NorthPark, Berkeley, Missouri facility. As evidenced at the hearing and in the briefs, the parties agree there is only one issue. The Employer contends that the Petitioner is a business rival of the Employer and is disqualified from

[1] The Employer's name appears as amended at hearing.

representing the petitioned-for employees. The Employer further contends that because the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Program contracts with Ranken Technical College (Ranken), a competitor,[2] to provide classroom instruction, collective bargaining with the Petitioner would result in a clear and present danger to the Employer. The Petitioner contends that it is not a business rival of the Employer.[3] The Petitioner argues that the apprenticeship programs that the Employer bases its argument on are unrelated entities and not under the control and domination of the Petitioner; and, even if they are sufficiently under the Petitioner's control, the apprenticeship programs do not compete with the Employer. As discussed more fully below, I find that the Petitioner is qualified to act as the bargaining representative of the Employer's employees.

I. BACKGROUND

A. The Employer's Operations

The Employer operates a private, for-profit career college with facilities located in various cities and states. The only facility involved is the Employer's NorthPark Campus located in Berkeley, Missouri. The Employer is accredited by the Accrediting Commission of Career Schools and Colleges of Technology, which is listed by the U.S. Department of Education as a nationally recognized accrediting agency. The Employer is certified to operate by the Coordinating Board for Higher Education, State of Missouri.

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[2] The parties stipulated that the Employer and Ranken are business rivals in providing educational programs in the St. Louis, Missouri area.

[3] The Petitioner filed a Motion to Correct the Record as to its initial statement of position on the record, contending Petitioner's counsel was either misquoted or misspoke. The hearing record and the Petitioner's post-hearing brief established that it is the Petitioner's position that it is not in competition with the Employer.

Brandon Shedron is the Employer's senior vice president and chief academic officer and makes all final decisions regarding academic operations, policies, and procedures. There are eight program directors and two directors of education (DOE)[4] who report to the regional academic dean, who, in turn, reports to Shedron. There are approximately 43 full-time instructors and 11 adjunct and part-time instructors who report to their program director.

The Employer's NorthPark Campus offers diplomas in combination welding; computer technology; cosmetology; electrical mechanics; heating, air conditioning, and refrigeration; information systems security; and plumbing. The diploma programs, with the exception of cosmetology, consist of 60 weeks and 72 quarter credit hours[5] of classroom theory and associated lab work, and train students for entry level employment. The Employer also offers an Associate of Occupational Studies, A.O.S., in combination welding technology; computer systems and network technology; electrical mechanics technology; heating, air conditioning, and refrigeration technology; medical assistant;[6] medical billing and coding; plumbing technology; and web design and multimedia application development. The associate programs, with the exception of medical assistant, consist of 90 weeks, 94.5 quarter credit hours of classroom theory and associated lab work and 13.5 quarter credit hours of general education totaling 108 quarter credit hours. The goal of the A.O.S. is to train students for entry level

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[4] The parties stipulated that the program directors and DOEs are supervisors within the meaning of Section 2(11) of the Act.

[5] Quarter credit hours multiplied by two thirds equals the equivalent of semester hours.

[6] The Employer is phasing out its Medical Office Assistant program and is not accepting any new enrollees in the program.

employment as well as learn management skills and advanced techniques in the individual program of study. The credit hours earned in a diploma program are applied to the associate program in the same career field. Finally, the Employer offers a Bachelor of Science, B.S., in Computer Engineering and Network Technology, which consists of 170 weeks and a total of 213 quarter credit hours. The academic calendar provides for course instruction to begin every 10 weeks.

Approximately 1400 students are presently enrolled at NorthPark. There are about 170 students enrolled in the plumbing program; 100 in combination welding; 350 in heating, air conditioning, and refrigeration; 225 electrical mechanics; 180 in cosmetology; 300 in medical; and about 75 in computer technology.

Admission to the Employer is open to the general public. The admission policy requires that the applicant have a high school diploma or a general education diploma (GED). The applicant must also complete a personal interview, an application for admission, an enrollment agreement, request a high school or GED transcript, submit college placement test scores, fill out financial aid forms if applicable,[7] and pay a registration fee.[8] Students pay their own tuition upon enrollment or pay pursuant to a tuition financing proposal. Some students may receive tuition reimbursement from their company. The Employer has Federal and academic grants, Federal and private loans, and scholarships. The Employer is also approved for Veterans' education benefits; for example, the Employer participates in the Veterans' Yellow Ribbon program which gives

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[7] Students are eligible for various grants, loans, and scholarships.

[8] Tuition for the electrical mechanics, as well as the plumbing, combination welding, and heating, air conditioning, and refrigeration programs, is $21,600 for the diploma and $33,000 for the A.O.S.

supplemental funding through a matching contribution from the Employer to students that have veterans' benefits. The Employer will evaluate the student's prior education, training, and work experience to determine if any subjects or training activities in the student's program may be waived and thereby reduce the amount of education or training required for the student to reach the educational objective. The Employer also has grade point average and certain attendance requirements for its students.

Career Services provides a graduate placement process that includes the writing of resumes and the interview process, but the Employer does not guarantee employment. The Career Services office also conducts career fairs twice a year inviting 30 to 40 prospective employers seeking to hire the Employer's students, networks in the community for available job opportunities, posts weekly job boards by program, and assists in finding part-time employment for students while in school. The Employer's Retention Department works to ensure student success through use of internal and external campus resources such as student transportation to attend classes, tutoring, and faculty advising. The Employer has articulation agreements with Phoenix University and Southwest University, and other area, regional, and state institutions setting forth mutual agreements to facilitate the transfer of students' academic credits between the schools.

The Employer uses various marketing methods to attract students, including television, newspapers, direct print mailings, billboards, and radio, and sets up information booths at high schools, career fairs, and community outreach programs. The Employer partners with governmental agencies in its recruiting efforts, including Vocational Rehabilitation and the Department of Veterans' Affairs.

B. The Petitioner

The Petitioner, with more than 24,000 members, is a not-for-profit, tax exempt labor organization with a geographical jurisdiction covering Missouri, Kansas, and Southern Illinois. The Petitioner is governed by approximately 300 delegates representing 57 Locals. The delegates elect the Petitioner's 10 member Executive Board. Terry Nelson serves as the Executive Secretary-Treasurer and Albert Bond serves as Assistant Executive Secretary-Treasurer. The Petitioner maintains its own financial books and records separate from its health, welfare, and apprenticeship funds and has its own Federal Tax Identification number, files separate tax and Department of Labor (DOL) forms, and contracts and pays for its own audits.

The Petitioner employs Dr. John Gaal as its Director of Training and Workforce Development. Gaal's duties include overseeing the training of Petitioner's members, advising the various training and apprenticeship programs operated by the Carpenters Joint Training Fund (the Fund) on direction, process and procedure, and researching the development of the Carpenters' workforce. Gaal's office is responsible for monitoring and reimbursing tuition for members who take advanced courses at one of the joint apprenticeship programs or at area colleges and schools. The Local Unions reimburse the Petitioner for 50 percent of its members' tuition. Gaal has no role in the appointment of Fund trustees, joint apprenticeship committee members, or the coordinators of the joint apprenticeship programs; however, he advises all of the committees and is a member of the Southeastern Missouri Carpenters Joint Apprenticeship Committee (SEMO CJAP).

Though not a function of his position as the Petitioner's Director of Training and Workforce Development, Gaal is also an adjunct professor at Webster University in the School of Business and Technology, is a member of Ranken's Bachelor of Science advisory program board, and participated in the Secretary of Labor's Advisory Committee on Apprenticeship, which revised the DOL's apprenticeship standards for the first time in 30 years. When the Fund established the Associated Electrical Contractors Local Union 57 Apprenticeship Committee and Program in 2008, Gaal attended two meetings held between the new program coordinator, Mike Short, and Ranken over instructional classes to be taught at Ranken. Gaal advises various area secondary school trade programs including the Construction Career Center, North and South County Special School District programs, Bayless Middle and High School, Rolla Technical Institute, and Lewis and Clark vocational-technological school.

C. The Carpenters Joint Training Fund (The Fund)

The Constitution of the United Brotherhood of Carpenters and Joiners of America provides among its Objects "to organize workers, to encourage an apprenticeship system and a higher standard of skill." It also provides the following:

> Apprenticeship
> A. Section 43. The United Brotherhood may establish Standards for apprenticeship and training programs, including skill upgrading, covering trades and industries within the United Brotherhood's jurisdiction. Where such Standards have been established, it shall be the responsibility of District Councils or Regional Councils, or of Local Unions where no District or Regional Council exits, to develop and implement programs complying with the Standards and approved by the United Brotherhood. A graduate of an approved apprenticeship program shall be recognized within the United Brotherhood as a journeyman at his or her trade.

The collective-bargaining agreements between the Petitioner and signatory employers and employer associations provide for the continuation of the joint training

trust fund known as the "Carpenters Joint Training Fund of St. Louis", previously called the Fund. The Board of Trustees for the Fund consists of 12 persons: 6 trustees designated by the Petitioner, referred to as Union Trustees; and 6 trustees designated by the employers, referred to as Employer Trustees. Two of the Employer Trustees are appointed by the Associated General Contractors, two by the Home Builders Association, one by the Flooring Industry Council of St. Louis, and one by the Southern Illinois Builders' Association. The Union Trustees include Terry Nelson, the Petitioner's Executive Secretary-Treasurer and Albert Bond, Assistant Executive Secretary-Treasurer. Nelson serves as a trustee pursuant to the Petitioner's By-Laws and Trade Rules. The remaining four Union Trustees are members and business representatives of the Petitioner. The Petitioner has no input into the selection of the Employer Trustees. The trustees elect a chair and secretary from among themselves. No trustee is paid for his services to the Fund.

The Fund is a 501(d) not-for-profit, tax exempt organization, independent of the Petitioner, which provides the Joint Apprenticeship Programs to members of the Petitioner. The Fund is primarily financed by contributions made by signatory contractors for each hour worked by employees covered by a collective-bargaining agreement. Approximately 10 contractors have collective-bargaining agreements with the Petitioner that do not provide for contributions to the Fund. The Fund also earns income from investments. The Fund's financial statements are separate and independent from the Petitioner and the Fund has its own Federal Tax Identification number. While the Fund uses the same auditor as the Petitioner, the Fund pays for its own audits.

According to the Carpenters National Guidelines for Apprenticeship Standards, the Joint Apprenticeship Programs are registered with the DOL Bureau of Apprenticeship and Training (DOL BAT), and are administered by the five joint apprenticeship committees: the St. Louis Carpenters' Joint Apprenticeship Committee (CJAC); the Floor Layers Joint Apprenticeship Committee (FLJAC); the Southeast Missouri Carpenters' Joint Apprenticeship Committee (SEMO CJAC), which provides both carpenter and millwright training programs; the Southern Illinois Carpenters' Joint Apprenticeship Committee (So IL CJAC), which also provides both carpenter and millwright training programs; and the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Committee (EJAC). Each committee consists of an equal number of labor representatives and management representatives from their respective programs. Nelson and Bond are two of the six labor members of CJAC and the two labor members of EJAC. The Fund employs a coordinator to oversee each program, which coordinators are selected by their committee members.

The Fund maintains offices and classrooms at the Fund's Nelson-Mulligan Carpenters' Training Center located at 8300 Valcour Avenue in Affton, Missouri, here called the Valcour facility, which is located a few miles from the Petitioner's offices in St. Louis City. The Valcour facility is used by the St. Louis Carpenters' Joint Apprenticeship Program (CJAP), the Cabinetmakers', Display and Millwork Joint Apprenticeship Program (CDM), the Floor Layers Joint Apprenticeship Program (FLJAP), and the Associated Electrical Contractors Local Union 57 Joint Apprenticeship Program (EJAP). The Petitioner loaned the Fund money to purchase the Valcour facility, which the Fund is repaying. There are also training centers in Cape Girardeau,

Missouri and Belleville, Illinois, which houses SEMO CJAP and So IL CJAP, respectively. These training centers are utilized by all of the Petitioner's members during their apprenticeship and by journeymen for continuing education. The Petitioner lists its training opportunities on its website and in its quarterly newsletter, including the apprenticeship programs and training center. Each of the five joint apprenticeship committees also maintains their own websites on which they advertise their programs. Each apprenticeship committee created its own DOL-registered programs which are the property of the individual committees and not the Petitioner.

D. Associated Electrical Contractors Local Union 57 Joint Apprenticeship Committee and Program (EJAC and EJAP) and Ranken

Apprenticeship Committee and Program. The EJAC was formed in mid-2008 and the documentation for the EJAP was submitted to the DOL BAT for approval and registration. EJAC made changes requested by the DOL BAT, and the program was approved in October 2008. The apprentices started in January 2009. The EJAC is comprised of four committee members and two alternates with an equal number of labor and management representatives. Petitioner's Nelson and Bond serve as labor representatives on the EJAC. The record is silent as to the identity of the alternate labor committee member. The EJAC is financed by contributions to the Fund made by signatory contractors in the electrical industry for each hour worked by employees covered by the collective-bargaining agreement. The hourly contribution to the Fund by electrical contractors is $.41 per reported hour.

The EJAP is an approximately 5-year classroom instruction and on-the-training program for careers in the electrical industry. The EJAP consists of 10 terms starting with a 2-week orientation program held at the Valcour facility, which includes an OSHA

certification course and aerial and forklift training. Orientation is followed by 9 terms consisting of 2 weeks of 40 hours per week of classroom instruction conducted at Ranken followed by 6 months of on-the-job training with a sponsoring electrical contractor. Applicants must be 18 years old, a U.S. citizen, and have a high school diploma, GED or obtain either within 1 year of starting the program. Apprentices must maintain membership in the Petitioner to participate in the EJAP. An apprentice's program starts after receiving a letter of intent to hire from a signatory contractor where the apprentice will perform the on-the-job training portion of the program. While in the program, during the 2-week classroom instruction, apprentices receive a small educational grant to help offset travel expenses related to the full-time training. During the on-the-job training portion, they receive apprentice wages from their employer. If an apprentice is laid off during the course of the program, the EJAP coordinator will assist the apprentice in finding another sponsoring contractor.

The EJAP will accept and consider prior related coursework completed by apprentices which may allow an apprentice to start the program at a higher level. The EJAP also has articulation agreements with other colleges and educational institutions allowing for apprentices' EJAP coursework to be applied to higher degree programs. Apprentices graduate from the EJAP when they are able to demonstrate completion of the program and compliance with the DOL's apprenticeship standards. Successful completion of the EJAP provides the apprentice with a journeyman certificate from the DOL. Currently there are 87 apprentices in the EJAP. In addition to the EJAP, the EJAC provides advanced skill courses for journeymen or apprentices, which are taught

by instructors at the Valcour facility or at Ranken. The EJAC advertises the EJAP through TV commercials, radio ads, brochures, and attendance at career and job fairs.

Mike Short is employed by the Fund as the coordinator of the EJAP. Short is a 20-year member of the Petitioner. Short's duties and responsibilities include overseeing day-to-day operations; coordinating apprentice activities including scheduling, discipline, employment, and guidance and assistance; ensuring that the courses taught are relevant to industry needs, that the apprentices have the knowledge and skills to work for the electrical contractors by whom they are employed, and that the training school is efficient and productive. Short drafts an operating budget for the EJAP and submits it to the EJAC for approval. Short is paid by the Fund and his earnings are determined by the EJAC guidelines. Short is authorized to make expenditures of less than $2500 without prior approval, but expenditures in excess of that must be approved by the EJAC and the Fund. Short maintains an office and classroom at the Valcour facility. When apprentices are engaged in the 2-week courses held at Ranken, Short visits the campus 2 to 3 times per week. Short hires the Carpenters' Joint Apprenticeship Program instructors to teach orientation portions of the EJAP and occasionally uses CJAP administrative staff. The instructors and administrative staff wages are deducted from the EJAP's operating budget and paid by the Fund to the CJAC.

Ranken. The nine 2-week classroom instruction portion of the EJAP is held at Ranken. Ranken is a not-for-profit career technical college providing certificates, associate degrees, and bachelor of science degrees. According to its catalog, Ranken offers 4 automotive programs; 5 construction programs, including carpentry and building construction, heating, ventilation, air conditioning and refrigeration, and plumbing

technology; 5 electrical programs; information technology, 3 manufacturing programs, and general education. Ranken is accredited by The Higher Learning Commission and is a member of the North Central Association of Colleges and Schools, a regional accreditation association. Accreditation standards are determined by the U.S. Department of Education. Ranken currently has approximately 2200 students. Ranken is overseen by a Board of Directors. No one from the Petitioner sits on the Board of Directors and neither the Petitioner nor the Fund has any ownership interest in Ranken.

When the EJAC created the EJAP in 2008, it inquired of Ranken about providing a classroom and laboratory instruction program specifically designed for its apprentices to be completed in short intervals followed by on-the-job training. Petitioner's Director of Training and Workforce Development Gaal was the only representative of Petitioner who advised EJAC on the program curriculum and twice met with EJAC Coordinator Short and a Ranken representative about setting up this program specifically for the EJAP. Ranken then presented a proposed course schedule for the EJAP and advised that it would charge the EJAC $1000 per student for each 2-week course. There is no written agreement between Petitioner, the Fund or the EJAC and Ranken covering the coursework that Ranken provides.

One Ranken instructor, Daniel Fitzsimmons,[9] is assigned to teach all of the EJAP courses including classroom instruction and complementary lab work. Fitzsimmons also teaches other courses at Ranken unrelated to the EJAP. The Petitioner, Fund, and EJAC did not have any input in Ranken's selection of the instructor. Ranken provides

[9] Fitzsimmons is listed as one of nine full-time electrical technology instructors. There is also a full-time division chair and two adjunct instructors of electrical technology. About 134 individuals have faculty credentials.

laboratory space for the EJAP students to demonstrate proficiency in the application of coursework to actual electrical settings. While other Ranken students enrolled in similar Ranken programs might use the same laboratory space as the EJAP apprentices, they do not use it while the EJAP program is in session. Only EJAP apprentices attend these 2-week EJAP courses and EJAP apprentices do not take any other Ranken courses that are open to its general student body.

Ranken does not consider the EJAP apprentices to be "students" of the college. The apprentice's enrollment in the course is determined by the EJAP, and Ranken bills EJAP for each apprentice's tuition. The apprentices are not entered into Ranken's student database, are not provided student identification cards, do not have access to Ranken's student services, and do not participate in student organizations, nor can they check out materials from Ranken's library. Ranken does not have the authority to remove apprentices from the EJAP for non-attendance; however, apprentices must comply with Ranken's Code of Conduct and are subject to its public safety procedures while on campus. Prior to the beginning of each term, EJAP Coordinator Short provides Ranken with a list of apprentices attending the course. The EJAP apprentices are given visitor parking passes when on campus.

E. Carpenters Joint Apprenticeship Committee and Program (CJAC and CJAP)

The CJAC, the Fund's largest apprenticeship committee, has 12 members comprised equally of labor and management representatives. The CJAP is an independent apprenticeship program separate from the other apprenticeship programs that also fall under the auspices of the Fund. The CJAC oversees the CJAP, which occupies the majority of the Valcour facility where it provides a general carpenter

apprenticeship program including classroom instruction and on-the-job training. The CJAC is financed by the Fund from contributions from signatory contractors in the industry for each hour worked by employees covered by a collective-bargaining agreement. The contribution to the Fund for CJAC signatory contractors is $.35 per reported hour worked by each employee. The Fund allocates $.10 of that amount to maintenance of the Valcour facility. The remaining $.25 is used by the CJAC to finance the CJAP. The CJAC also receives various grants for use in implementing its training programs.

The CJAP consists of an approximately 4-year program requiring apprentices to take 2 weeks, 40 hours per week, of training for every 750 hours (6 months) of on-the-job training. Applicants must be 18 years old, U.S. citizens, have a high school diploma or GED or obtain one within a year of starting the apprenticeship program, able to perform physical tasks, and be employed by a signatory contractor. Apprentices also must be members of the Petitioner. All classroom instruction for the CJAP occurs at the Valcour facility. The on-the-job training occurs with the sponsoring signatory contractor. During the 2-week classroom instruction, apprentices receive a $50 stipend and a $60 contribution to their health and welfare benefits. During the on-the-job training, apprentices receive apprentice wages from the contractor. The CJAP coordinator will assist an apprentice in finding a replacement sponsoring employer if laid off in order to help the apprentice achieve the 750 hours of required on-the-job training.

Like the EJAP, the CJAP will accept and consider prior related coursework completed by apprentices which may allow an apprentice to start the program at a higher level. The CJAP also has articulation agreements with other colleges and

educational institutions allowing for apprentices' CJAP coursework to be applied to higher degree programs. Apprentices graduate from the CJAP when they are able to demonstrate to the CJAC the completion of the program and compliance with the DOL's apprenticeship standards. Upon successful completion of the CJAP, the apprentice receives a journeyman certificate from the DOL. Currently there are 700 apprentices in the CJAP. In addition to the CJAP day program for apprentices, the CJAC also provides evening advanced skill classes for journeyman carpenters as well as interested apprentices which are taught by instructors at the Valcour facility. There are 12 full-time and 6 adjunct instructors as well as 4 office staff. All of the full-time instructors are members of the Petitioner and some of the part-time adjunct faculty are members. The office staff are not unionized or members of Petitioner. The CJAC employs one individual whose primary responsibility is to attend all career and job fairs and promote the program to potential apprentices and employers. CJAC also markets its program through informational television and radio ads.

Mark Fuchs is employed by the Fund as the coordinator of the CJAP. Fuchs has been a member of the Petitioner since 1978. As the coordinator, Fuchs oversees the day-to-day operations and objectives of the program and coordinates the schedules, attendance, and discipline of the apprentices. Fuchs is also responsible for ensuring the upkeep and maintenance of the Valcour facility and parking lots. Like EJAP's Short, Fuchs annually creates the CJAP's operating budget and submits it to the CJAC for review and approval by the Fund. Fuchs can only authorize expenditures of less than $2500 and expenditures in excess of that are authorized and approved by the CJAC and the Fund. Only the Fund writes checks on behalf of the CJAC and CJAP.

II. ANALYSIS

I find that the Petitioner is not a business rival nor does it control or dominate an organization that is a business rival of the Employer under the Board's conflict of interest doctrine and is qualified to represent the Employer's employees.

A. The Petitioner is Not a Business Rival of the Employer

Since the first Decision and Direction of Elections in Case 14-RC-12738 involving the same Employer (Vatterott I),[10] no new case authority in the area of business rivals or competitors has developed. As cited in the previous decision, it is well settled that a union may not represent the employees of an employer if a conflict of interest exists on the part of the union such that good-faith collective bargaining between the union and the employer could be jeopardized. *Bausch & Lomb Optical Co.*, 108 NLRB 1555 (1954). The conflict of interest doctrine is not limited to cases where a union and employer are in the same business; a union may also be disqualified when an enterprise controlled and dominated by the union engages in business with the employer. *Guardian Armored Assets, LLC*, 337 NLRB 556, 558 (2002), citing *St. John's Hospital and Health Center*, 264 NLRB 990 (1982). In order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, 316 NLRB 1233 (1995). The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, 293 NLRB 122 (1989), citing *Quality Inn Waikiki*, 272 NLRB 1, 6 (1984), enfd. 783 F.2d 1444 (9th Cir. 1986).

[10] The hearing officer took administrative notice of this case. The Employer requested review of that decision but the majority denied review.

First, with respect to the Petitioner, it is not directly engaged in a business similar to the Employer, rather, as stipulated by the parties, is a Section 2(5) labor organization with 24,000 members covering a geographical area of three states and thus is not a business competitor of the Employer. Significantly, only approximately 1,157 of Petitioner's members are currently enrolled in Fund apprenticeship programs, less than one-half of one percent of Petitioner's total membership.

Secondly, with respect to the Fund, it is a creation of a trust agreement pursuant to the terms of collective-bargaining agreements between the Petitioner and various signatory contractors. Pursuant to 29 U.S.C. §186(c), the Fund is governed by a board of trustees comprised of an equal number of Union and Employer Trustees who elect their officers from the board. The Fund created the apprenticeship committees which are comprised of an equal number of labor and management representatives whose role it is to form, operate, and govern the apprenticeship programs. While the Petitioner's Executive Secretary-Treasurer serves as a trustee for the Fund and sits on the apprenticeship committees, other Union Trustees are elected to their trustee positions by the 300 delegates of the Petitioner and thus are subject to being voted out. The Petitioner has no input into the selection of the Employer Trustees or the management apprenticeship committee members. Moreover, the separate apprenticeship committees' day-to-day operations are overseen by coordinators employed by the Fund. None of the program coordinators are officers or employees of

the Petitioner but are merely members.[11]

The Fund and the apprenticeship committees are financed by contributions from signatory contractors, not by the Petitioner. Also, pursuant to the Trust Agreement, the signatory employers' contributions must only be used for apprenticeship programs. The Petitioner has no say in the Fund's or the apprenticeship committees' expenditure of those funds. While the Petitioner loaned the Fund money that enabled the Fund to purchase the Valcour facility, the Fund has made payments to the Petitioner on that loan. The Petitioner and the Fund are located in different facilities, file separate and distinct tax and DOL forms, have separate Federal Tax Identification numbers, and submit to and pay for separate audits. Finally, the Petitioner and the Fund have no ownership interest in each other.

The Board has held that a trustee is presumed to be a fiduciary safeguarding the trust rather than an agent of the appointing party and "a trustee is not acting for the union or the employer unless contrary evidence shows otherwise." *Commercial Property Services,* 304 NLRB 134 (1991); see also, *Garland-Sherman Masonry,* 305 NLRB 511 fn. 1, 513 (1991). The Board has further held, affirmed by the Supreme Court, that the trustees of a trust fund, similar to the Fund here, are solely fiduciaries,

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[11] In Vatterott I, the petitioner and the Plumbers and Pipefitters' Welfare Educational Fund (fund) were found to be intermingled. In that case, unlike here, the apprenticeship fund training director, Mark Collum, was a fund employee and a fund trustee, having been recommended by petitioner's business manager. As training director for the fund, when problems arose, Collum consulted with a petitioner's executive board member who was also a trustee of the fund. Collum was a member and elected officer of the petitioner, its Examining Board, and a committeeman on the Joint Apprentice Training Committee. Collum also served as the petitioner's apprentice training program coordinator. In addition to the three roles Collum played for the petitioner, the fund and the committee, the fund instructors were all members of petitioner and covered by a collective-bargaining agreement. Three of the instructors were also officers of the petitioner and two of them were Examining Board members. Besides providing apprenticeship and training benefits, the fund also provided health and welfare benefits for members.

owing undivided loyalty to the beneficiaries and are not collective-bargaining representatives. *United Mine Workers of America, Local 1854,* 238 NLRB 1583, 1588 (1978), enfd. in part, denied in part, 614 F.2d 872 (3d Cir. 1980), judgment revd. sub nom. *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). See also, *Sheet Metal Workers' International Association*, 234 NLRB 1238, 1247 (1978). The Employer did not present any evidence at hearing that the Fund trustees have breached their fiduciary duties to the Fund or that Fund trustees have held themselves out as representatives or agents of the Petitioner.

In *Bausch and Lomb Optical Co.*, relied upon by the Employer, the petitioning union established a business that manufactured and distributed eyeglasses, the same business as the employer. The Board held the employer was not obligated to bargain with the union because the petitioner had become a direct business competitor of the employer and the union could derive financial benefits separate and distinct from employee interests by causing and prolonging a strike or even driving the employer out of business. 108 NLRB at 1561. Here, the Petitioner is clearly not in engaged in the business of providing diploma and degree educational programs to the general public and is not a direct business competitor of the Employer.

In both *St. John's Hospital and Health Center,* supra and *Visiting Nurses Association, Inc.,* 254 NLRB 49 (1981), also cited by the Employer, the petitioning union operated nurse registries that were solely governed and operated by the petitioning union or an affiliated association of the petitioning union and no management or other third party representative had any input into the petitioning union's operation of the registries. Also, the petitioner and the registries shared offices and staff and the

registries held themselves out to the public as the petitioner's registries. The petitioners in those cases exercised considerable control over the registries, authorizing their formation and their dissolution if deemed appropriate. *St. John's Hospital and Health Center,* supra. at 991 and *Visiting Nurses Association, Inc.*, supra. at 50. As set forth above, the Petitioner and the Fund and its apprenticeship committees are separate and distinct organizations and the Petitioner does not control or dominate the Fund and the committees.

B. Assuming the Petitioner Controls and Dominates the Fund and Apprenticeship Committees, there is No Disqualifying Conflict of Interest

Even assuming that the Petitioner and the Fund and its apprenticeship committees are intermingled such that Petitioner exercises control over and dominates the Fund and the apprenticeship programs, those programs do not compete with the Employer so as to disqualify the Petitioner as a bargaining representative. As cited above, in order to find that a union has a disqualifying conflict of interest, the Board requires a showing of a "clear and present" danger of interfering with the bargaining process. *Alanis Airport Services*, supra. The burden to prove a conflict of interest is on the employer and it is a heavy one because of the strong public policy favoring the free choice of a bargaining agent by employees. *Garrison Nursing Home*, supra, citing *Quality Inn Waikiki*, supra. Hypothetical and speculative testimony lack probative value. *CMT, Inc.,* 333 NLRB 1307, 1308 (2001). The Employer here has not met its heavy burden to show that the Petitioner's representation would pose such a clear and present danger sufficient to justify limiting employees' statutory right of free choice.

The Employer has 1400 students participating in seven diploma programs and eight A.O.S. programs, which it offers to the general public. There are 225 students in

the Employer's electrical mechanics program, who pay tuition of $21,600 for a diploma and $33,000 for an A.O.S. The Employer presented evidence at hearing that in its construction trades programs (combination welding, electrical mechanics, plumbing, and heating, air conditioning, and refrigeration), it teaches basic carpentry skills. The Employer does not have a separate carpentry diploma or degree program. The purpose of teaching basic carpentry skills to students in other trades is to provide them a general familiarity of carpentry to enable them to perform their specific tasks better, and it is not to teach them to perform carpentry tasks. While the Employer has a career services program that will assist students in obtaining employment, it does not guarantee that the student will obtain employment. The diploma and associate programs are 60 and 90 weeks long, respectively, and the Employer offers two 170-week bachelor programs in the computer field. The students divide their time between classroom theory and lab work. Programs are not limited in size and graduates of the diploma program are prepared for entry-level employment in their career field. Graduates of the Employer's diploma and associate electrical program may test into a higher level of the Fund's apprenticeship program.

In contrast, the Fund has apprenticeship programs in carpentry, millwright, floor laying, and electrical, which overlaps with only one of the Employer's programs – electrical mechanics. There are 87 apprentices currently enrolled in the EJAP. The apprenticeship programs are a benefit to the Petitioner's members who are employed by signatory contractors, who are the primary contributors to the Fund. Apprentices in the electrical and carpentry programs generally have 2 weeks of classroom instruction followed by 6 months of on-the-job training with a sponsoring signatory employer. The

apprentices pay no tuition for participation in an apprenticeship program. Instead, the apprentices receive a stipend while attending classroom instruction and apprentice wages during the 6 months of on-the-job training portion. The electrical apprentice program takes 5 years to complete and the carpentry program takes 4 years. Graduates of the programs are certified as journeymen by the DOL BAT. The number of apprentices admitted to the programs is limited to the number of apprentices signatory contractors will sponsor. In most cases, the sponsoring contractors also employ the apprentices upon completion of their apprenticeship program. The fact that both the Employer and the apprentice programs may recruit from similar sources and have some similar courses does not establish that the Petitioner and its apprentice programs have a disqualifying conflict of interest with the Employer. See *CMT, Inc.*, supra at 1310.

With respect to Ranken, the Employer argues that the EJAC's use of Ranken as a resource for providing specifically designed classroom instruction is further evidence that the Petitioner or the Fund and its apprenticeship committees are in competition with the Employer. Contrary to the Employer's assertion, the oral agreement between the EJAC and Ranken to provide classroom instruction at Ranken's campus is an arms-length transaction. The EJAC pays Ranken for each apprentice to attend class. Also, EJAC has only sent 87 apprentices to Ranken, which is insignificant in light of Ranken's general student population of 2200. Notably, those apprentices are only on Ranken's campus for 2 weeks every 6 months and participate in classes attended only by apprentices and no Ranken students. Ranken does not consider the apprentices part of its student body – they are not in Ranken's student database, are ineligible for financial

aid, do not have library or other student service privileges, and are provided with visitor parking passes for the limited time they are on campus. Ranken has no financial ownership interest in the Petitioner, the Fund or the apprenticeship program and vice versa. In addition, the Petitioner has no direct role in selecting the coursework the EJAC requested Ranken teach its apprentices. Nor does Ranken have any input into the apprentices selected by the EJAP to attend Ranken courses.

The Employer has failed to establish that the Petitioner has a "clear and present" danger of interfering with the bargaining process and will sacrifice the interests of represented employees for its own financial interests. The Employer has not established that the Petitioner would in any way alter its bargaining proposals to benefit its apprentice program. In fact, if the Petitioner were to cause a strike or drive the Employer out of business, that would not benefit either the Petitioner or its apprentice program because admittance into the apprentice program is limited to those apprentices who have been hired by signatory employers and not to the general public from which the Employer generates its student body. The apprentice program is of no direct economic benefit to the Petitioner as an institution and the elimination of the program would not directly affect the Petitioner's financial interest.

The Employer contends that any student choosing to enter the apprenticeship program instead of the Employer's school is a direct benefit to the Petitioner in the form of dues, initiation fees, and increased contractor contributions. The Board will not deprive employees of their right to select their collective-bargaining representative based on such speculation or conjecture. There is nothing in the record to suggest that employees educated by the Employer are any less likely to desire union representation

and be willing to pay dues than the universe of employees in general. Again, contractor contributions to the apprentice program are of no direct financial benefit to the Petitioner per se.

At hearing and on brief, the Employer argued that its offer of proof regarding its "clear and present danger" evidence was improperly rejected by the hearing officer[12]. The Employer's evidence on clear and present danger is prefaced on the incorrect assumption that the Petitioner and the Fund and its apprenticeship committees are intermingled as the Regional Director found in Case 14-RC-12738. The Employer's assertion that it would be harmed by bargaining with the Petitioner because of a possibility that it would have to disclose to the Petitioner highly confidential and proprietary information fails because it assumes that any information it would disclose to the Petitioner in negotiations is de facto disclosed to the Fund, the apprenticeship committees, and to Ranken. In this case however, as set forth in detail above, the Petitioner and the Fund and apprenticeship committees are not intermingled and the evidence shows that the Petitioner does not have control over or dominate the Fund.

As to Ranken, no evidence was presented or included in the Employer's offer of proof that Ranken has any connection to or input in the Petitioner's collective bargaining with signatory contractors. The record is also devoid of any evidence that the only representative of Petitioner that is or was remotely connected to Ranken, Director of Training and Workforce Development Gaal, has any role in Petitioner's collective bargaining with signatory contractors. Rather, Gaal was only involved in the initial

[12] Upon rejection of the Employer's offer of proof, the hearing officer inquired whether the Employer desired to seek a special appeal, which the Employer declined. Where the Employer can request review of this decision, the Employer is not denied due process.

discussions with Ranken on the appropriate coursework that Ranken would provide as a vendor to the EJAP. Gaal has had no further input in EJAP's operation of its apprenticeship program including Ranken's participation.

With respect to the apprenticeship committees and their programs, the offer of proof presented no evidence that EJAP Coordinator Short or CJAP Coordinator Fuchs play any role in Petitioner's collective bargaining with signatory contractors. Neither Short nor Fuchs are officers of Petitioner and they were selected for the positions by their respective joint apprenticeship committee members that are comprised of both labor and management committeemen. The Employer did not assert in its offer of proof evidence that the mere presence of Petitioner's Executive Secretary-Treasurer and Assistant Executive Secretary-Treasurer on the apprenticeship committees signifies that any information disclosed to the Petitioner in negotiations would be provided to the Fund, the committees, or Ranken.

Further, as set forth above, the Fund and its committees are not direct competitors of the Employer. The Employer offers diploma and degree programs which are governed by Department of Education guidelines while the apprenticeship programs are governed by Department of Labor standards. The Employer's programs are designed to be completed in 60 or 90 weeks and designed to provide entry level employment. The Fund and its committees training programs seek to provide on-the-job training and classroom instruction over several years with the goal of attaining journeyman status.

With respect to the Employer's assertion that it would have to contribute to the Petitioner's joint training fund, this argument fails where participation in the fund is

subject to negotiations, the Employer is not required to agree to those provisions, and there are at least 10 other signatory contractors whose collective-bargaining agreements do not provide for contributions to the Fund.

Accordingly, in these circumstances, I find that the Petitioner's representation of the Employer's employees does not constitute a "clear and present danger" to the collective bargaining process and no disqualifying conflict of interest exists based on the Petitioner's affiliation with the apprentice program. See *Guardian Armored Assets, LLC*, supra; *CMT, Inc.*, supra; *Alanis Airport Services, Inc.*, supra; *Associated Dry Goods Corp.*, 150 NLRB 812, 813 fn. 4 (1965) (Board declined to apply the *Bausch & Lomb* principle where it found that the alleged rival business was a cooperative store operated by the union for the use of the members only and could not be regarded as being in competition with the employer). If an actual conflict of interest should arise after the certification of the Petitioner, a party may raise that issue at that time through appropriate procedures under the Act. *CMT, Inc.*, supra at 1309 fn. 7; *Alanis Airport Services, Inc.*, supra at 1234.

III. CONCLUSIONS AND FINDINGS

Based on the entire record in this matter and in accordance with the discussion above, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction here.

3. The Petitioner claims to represent certain employees of the Employer.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The following employees of the Employer constitute units appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

> The Full-Time Instructors Unit
>
> All full-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING adjunct and part-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.
>
> The Adjunct and Part-Time Instructors Unit
>
> All adjunct and part-time instructors employed by the Employer at its NorthPark, Berkeley, Missouri facility, EXCLUDING full-time instructors, temporary employees employed by ADECCO, office clerical employees, guards, and supervisors as defined in the Act.

IV. DIRECTION OF ELECTIONS

The National Labor Relations Board will conduct secret ballot elections among the employees in the units found appropriate above. The employees in these units will vote on whether or not they wish to be represented for purposes of collective bargaining by Carpenters' District Council of Greater St. Louis and Vicinity. The date, time, and place of the elections will be specified in the Notice of Election that the Regional Office will issue subsequent to this Decision.

A. Voting Eligibility

Eligible to vote in the election are those in the units who were employed during the payroll period ending immediately prior to the date of this Decision, including

employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are: (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

B. Employer to Submit List of Eligible Voters

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters in each unit. *North Macon Health*

Care Facility, 315 NLRB 359, 361 (1994). These lists must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the lists should be alphabetized (overall or by department, etc.). Upon receipt of the lists, I will make them available to all parties to the election.

To be timely filed, the lists must be received in the Regional Office, 1222 Spruce Street, Room 8.302, St. Louis, MO 63103, on or before **February 7, 2011**. No extension of time to file the lists will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file the lists. Failure to comply with this requirement will be grounds for setting aside the elections whenever proper objections are filed. The lists may be submitted to the Regional Office by electronic filing through the Agency's website, www.nlrb.gov,[13] by mail, or by facsimile transmission at (314) 539-7794. The burden of establishing the timely filing and receipt of the list will continue to be placed on the sending party.

Since the lists will be made available to all parties to the election, please furnish a total of **two** copies, unless the lists are submitted by facsimile or electronic mail, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

C. Notice of Posting Obligations

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices of Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 days prior to the date of the elections. Failure to follow the posting requirement may result in additional litigation if proper objections to

[13] To file the eligibility list electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions.

the elections are filed. Section 103.20(c) requires an employer to notify the Board at least 5 working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

V. RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by **February 14, 2011**. The request may be filed electronically through E-Gov on the Agency's website, www.nlrb.gov[14], but may not be filed by facsimile.

Dated: January 31, 2011
at: Saint Louis, Missouri

Claude T. Harrell Jr., Regional Director
National Labor Relations Board
Region 14
1222 Spruce Street, Room 8.302
St. Louis, MO 63103-2829

[14] To file the request for review electronically, go to www.nlrb.gov and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu, and follow the detailed instructions. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under "E-Gov" on the Agency's website, www.nlrb.gov.